Supreme Court, U.S.
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No. _____

# In the Supreme Court of the United States

SPRINT CORPORATION, DBA SPRINT SPECTRUM L.P.;
SPRINT SPECTRUM FINANCE CORPORATION, DBA SPRINT PCS,
*Petitioners*,

v.

WILLIAM E. GAGNON,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. In an employment discrimination case, is direct evidence required to trigger the application of the "mixed motive" analysis set out in *Price Waterhouse v. Hopkins* and 42 U.S.C §§ 2000e-2(m) and 2000e-5(g)(2)(B)?

2. If direct evidence is required, what are the appropriate standards for the lower courts to follow in determining what constitutes direct evidence that triggers the application of the "mixed motive" analysis set out in *Price Waterhouse v. Hopkins* and 42 U.S.C §§ 2000e-2(m) and 2000e-5(g)(2)(B)?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Sprint Corporation, a publicly traded company. Petitioner does not have a parent corporation, and to its knowledge, no publicly traded company owns 10% or more of Petitioner's stock. Respondent is William E. Gagnon, an individual.

Petitioner notes that Respondent initially filed his lawsuit against Sprint Corporation and another entity, Sprint Spectrum Finance Corporation, which was also a publicly traded company. Sprint Spectrum Finance Corporation changed its name to Sprint Spectrum Services Corporation on January 8, 2002, and that company was dissolved on January 28, 2002.

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## OPINIONS BELOW

The March 19, 2002 opinion of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") is reported at 284 F.3d 839 (8th Cir. 2002), and reprinted at App. 2a-29a. The Eighth Circuit's order denying Petitioners' request for rehearing and rehearing *en banc* is reprinted at App. 1a. The May 10, 2001 order of the United States District Court for the Western District of Missouri that prompted the Eighth Circuit appeal is reprinted at App. 30a-53a.

## STATEMENT OF JURISDICTION

The Eighth Circuit issued its opinion on March 19, 2002. Petitioners' timely petition for rehearing and rehearing *en banc* was denied on May 22, 2002. This petition for certiorari is timely in that Petitioners have filed it within 90 days of May 22, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), in that Petitioners seek review of a final opinion of the Eighth Circuit.

## STATUTORY PROVISIONS INVOLVED

42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m), and 2000e-5(g)(2)(B) are the relevant statutes involved in this Petition. 42 U.S.C. § 2000e-2(a)(1) provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(m) provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-5(g)(2)(B) provides:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

## STATEMENT OF THE CASE

### I. Overview of the Case

On March 19, 2002 the Eighth Circuit (Judges Morris Arnold, Beam, and Riley (the "Panel")) reversed and remanded the district court's judgment as a matter of law against William Gagnon on his Title VII discrimination (white male) claim. The sole basis for the reversal was the Panel's conclusion that a single ambiguous comment by a recommending authority that had no plausible impact on the decision at issue constituted "direct evidence" of discrimination. The Eighth Circuit erroneously ruled that this single ambiguous comment entitled Gagnon to a jury trial under the *Price Waterhouse*[1] "mixed motive" framework.

### II. Background of the Case

William Gagnon filed this employment discrimination case on July 20, 1999 in the United States District Court for the Western District of Missouri. Gagnon sued Sprint Corporation, d/b/a Sprint Spectrum L.P., and Sprint Spectrum Finance Corporation, d/b/a Sprint PCS (collectively, "Sprint"), alleging the following claims: (1) reverse race and gender discrimination under Title VII, 42 U.S.C. § 2000 *et seq.*, and the Missouri Human Rights Act ("MHRA"); (2) retaliation under Title VII and the MHRA; and (3) discrimination and retaliation under the Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq.* All of Gagnon's claims have reached final disposition through the district court and the Eighth

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[1] *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Circuit, except for Gagnon's reverse discrimination claims under Title VII and the MHRA. Gagnon's remaining reverse discrimination claims are the subject of this Petition; accordingly, the Statement of the Case is confined to those claims.[2]

Sprint hired Gagnon, a white man, in March 1997 as a curriculum developer in its training department. App. 4a, 32a. The employees in that department were approximately 95% percent white and 50% male. App. 47a. Jim Mendenhall, a department vice president and also a white man, approved Gagnon's hiring. App. 32a. In October 1997, during a hiring and expense freeze, Mendenhall promoted Gagnon to Computer Based Training Manager. App. 4a, 32a-33a. Days later Mendenhall considered Gagnon's promotional increase request. App. 4a-6a, 33a-37a.

Sprint's promotion policy at that time contained 3 guidelines to determine the amount of a promotional raise:

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[2] Sprint is asking the Court to rule on an important issue under Title VII. In administering the MHRA, courts follow the authority of the federal courts interpreting federal anti-discrimination statutes. *See Flannery v. Trans World Airlines*, Inc., 160 F.3d 425, 427-28 (8th Cir. 1998); *Hennessey v. Good Earth Tools, Inc.*, 126 F.3d 1107, 1108 & n.2 (8th Cir. 1997). Accordingly, while Sprint is not asking the Court to interpret the MHRA, the Court's ruling on the Title VII issue presented by this Petition will have a residual effect on Gagnon's MHRA claim.

The facts in the Statement of the Case are taken from the undisputed facts in the district court's order from which Gagnon appealed, as well as the Eighth Circuit's opinion. Both opinions are contained in the Appendix. App. 2a-53a.

(1) the standard raise upon promotion was a 5% increase to the employee's base salary; (2) Sprint had discretion to grant up to a 20% increase, but only in "extraordinary" cases; and (3) any raise of 10% or more required additional review and approval by a "Chief Officer or his designee." App. 5a, 33a-34a.

Sprint required that a raise request of 10% or more go through a Compensation Exception Request process. First, the employee's departmental director, as the initiator of the request, filled out a Compensation Exception Request Form stating the requested raise and justification for the request above policy limits. The request then went to the compensation group within Human Resources and a department vice president for their respective recommendations. Finally, the request – with the comments of the Vice President and Human Resources – went to the Chief Officer or his designee for decision. App. 4a-5a, 33a-34a.

With Gagnon's assistance, Lynn Meredith-Ball, the acting director of the training department, completed a Compensation Exception Request Form for Gagnon's proposed promotional raise. App. 5a, 35a-37a. Meredith-Ball proposed a raise in Gagnon's salary from $44,100 to $66,000, roughly a 50% increase, even though he had no employees to supervise and had not yet worked as a manager. App. 5a, 35a-37a. The proposed increase was 2 ½ times beyond the "extraordinary" raise contemplated in Sprint's promotion policy. Meredith-Ball took her proposal to Julie Moylan, a Compensation Manager, who recommended a 25% raise. App. 5a, 37a. Meredith-Ball then took the request to Mendenhall, the department vice president. App. 5a, 35a-37a.

Meredith-Ball says that when she took Gagnon's Compensation Exception Request Form to Mendenhall, he exploded in anger upon seeing the size of the request. Mendenhall allegedly threw the paper back at Meredith-Ball in disgust, stating: "I'm not going to pay him that, he's a white guy, isn't he? If he were a woman or a minority, I would have to pay him." Mendenhall further stated: "That's absurd. Nobody gets more than ten percent." App. 5a, 36a-37a. This comment was the only basis for Gagnon's discrimination claim.

Al Kurtze was a Chief Officer, Mendenhall's boss, and also a white man. App. 6a, 34a-35a, 37a. Kurtze had the ultimate decisionmaking responsibility on Gagnon's raise. *Id.* Meredith-Ball did not take the original Compensation Exception Request Form seeking the 50% raise to Kurtze. App. 5a-6a, 37a. Rather, she changed the form to request an immediate 11% raise plus another automatic 10% raise in 6 months, for a total of 21% over 6 months. App. 5a-6a, 34a-35a, 37a. Meredith-Ball took the modified request to Moylan, who concurred with the 11% raise upon promotion, but not the automatic 10% raise in 6 months. *Id.* Meredith-Ball then took the form to Mendenhall, who endorsed the revised request for a 21% total raise over 6 months. *Id.* Kurtze, however, rejected Mendenhall's recommendation. *Id.* He approved only an 11% promotional raise, but not the additional guaranteed 10% raise in 6 months. *Id.* Gagnon's approved raise complied with Sprint's promotion policy. App. 5a, 33a-34a.

Gagnon claimed that Sprint discriminated against him because of his race and gender by giving him an 11% raise, instead of the 50% raise initially requested. App. 6a, 35a-36a. Gagnon admitted at trial that he had no basis to claim that Kurtze discriminated against him, and that he was making

no such allegation. App. 46a. Gagnon offered no evidence of a single female or minority Sprint employee who ever received a raise outside the compensation policy. App. 48a. The only evidence that Gagnon used in support of his claim was the alleged Mendenhall comment, which Gagnon contended was "direct evidence" of discrimination. App. 10a, 44a. Gagnon claimed that solely on the basis of Mendenhall's alleged comment, his case belonged before the jury under the *Price Waterhouse* "mixed motive" rubric.

## III. Disposition by the Lower Courts

At trial, Sprint moved for judgment as a matter of law ("JAML") at the close of Gagnon's case in chief, pursuant to Fed.R.Civ.P. 50. The court granted JAML, holding that Mendenhall's alleged comment was not "direct evidence" for two reasons: (1) according to all of the evidence at trial, Mendenhall merely recommended, but did not decide, Gagnon's raise; and (2) given that Kurtze knew nothing about the alleged Mendenhall comment and rejected Mendenhall's ultimate recommendation in favor of a *lower* raise, no reasonable juror could conclude that Mendenhall's alleged bias had any causal impact on Gagnon's raise. App. 43a-48a.

Gagnon appealed the district court's ruling to the Eighth Circuit. Sprint argued on appeal that this was not the rare *Price Waterhouse* "direct evidence" case for two primary reasons. First, considering the speaker and context of the single comment, a jury must rely on unreasonable inference to conclude that Mendenhall actually developed and acted upon a true discriminatory animus against his own race and gender just days after promoting Gagnon. Second, given that Kurtze rejected Mendenhall's 21% recommendation and decided upon a flat 11% raise, there was no basis to conclude

that Mendenhall's alleged animus had any causal impact on the ultimate decision at issue.

The Panel reversed and remanded Gagnon's reverse discrimination claims to the district court for trial, because it found Mendenhall's comment constituted "direct evidence." The Panel defined "direct evidence" sufficient to trigger the *Price Waterhouse* analysis as "evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude in such a way that the fact finder could infer that the attitude was more likely than not a motivating factor in the employer's decision." App. 8a-13a.

The Panel concluded that Mendenhall was "the decisionmaker" on his refusal to recommend a 50% raise for Gagnon, but did not explain how Mendenhall's comment was causally connected to the ultimate decision and the challenged act – Kurtze's grant of an 11% raise. Nor did the Panel's decision address how Mendenhall's comment, when taken in context, revealed a true discriminatory animus without reliance on speculation. *Id.*

Sprint petitioned for rehearing by the Panel and the entire Eighth Circuit, *en banc*. The petition was denied on May 22, 2002. App. 1a.

## REASONS FOR GRANTING THE PETITION

"Today the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion." *Price Waterhouse*, 490 U.S. at 279 (Kennedy, J., Rehnquist, J., Scalia, J., dissenting). Thirteen years of experience has proven this first sentence from the *Price Waterhouse* dissent prophetic.

## I. Review is Necessary to Resolve the Confusing Split Among and Within the Circuits on an Important Issue of Federal Law

In *Price Waterhouse*, the Court created a fork in the analytical road in employment cases. Routine *McDonnell Douglas / Burdine*[3] cases follow one analysis, and "mixed motive" cases – which shift the burden of persuasion on causation to the employer – follow another. However, the Court did not provide clear guidance as to the nature and quantum of proof necessary to divert a case from the routine *McDonnell Douglas / Burdine* analysis to the *Price Waterhouse* "mixed motive" analysis.

The plurality opinion offered no meaningful description of the evidence required to trigger a *Price Waterhouse* "mixed motive" analysis. Justice O'Connor's concurrence provided some direction – only the rare "direct evidence" cases follow the *Price Waterhouse* "mixed motive" path; all other cases follow the *McDonnell Douglas / Burdine* path. But Justice O'Connor's concurrence provided little guidance as to what constitutes "direct evidence" in these cases.

In his dissent, Justice Kennedy prophesied the confusion *Price Waterhouse* would leave in its wake:

> Although the Price Waterhouse system is not for every case, almost every plaintiff is certain

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[3] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

> to ask for a Price Waterhouse instruction, perhaps on the basis of "stray remarks" or other evidence of discriminatory animus. Trial and appellate courts will therefore be saddled with the task of developing standards for determining when to apply the burden shift. One of their new tasks will be the generation of a jurisprudence of the meaning of "substantial factor." Courts will also be required to make the often subtle and difficult distinction between "direct" and "indirect" or "circumstantial" evidence. Lower courts long have had difficulty applying McDonnell Douglas and Burdine. Addition of a second burden-shifting mechanism, the application of which itself depends on assessment of credibility and a determination whether evidence is sufficiently direct and substantial, is not likely to lend clarity to the process.

*Price Waterhouse*, 490 U.S. at 291. Justice Kennedy's concern in 1989 is today's reality. Moreover, this problem is not merely academic; it is a practical everyday issue for district court judges and litigants in the mass of employment discrimination cases flooding the courts.[4] The ambiguity of the *Price Waterhouse* opinions has resulted in a confusing

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[4] In 2001, the portion of the U.S. District Courts' civil dockets devoted to employment discrimination cases consisted of 21,157 cases. Leonidas, Ralph Meacham, *2001 Annual Report of the Director for the Judicial Business of the United States Court*, at Table C-2A, < http. // www.uscourts.gov / judbususc / judbus. html >. Only general habeas corpus petitions comprised a larger portion of the courts' civil dockets - 24,684 cases. *Id.*

split in authority among the circuits, and even within the circuits, as to when "the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered." *Id.* at 262 (O'Connor, J., concurring).

The lower courts and litigants, especially employers, experience the results of this confusion long before juries deliberate. Amidst the confusion in the circuits as to what evidence is required to trigger *Price Waterhouse*, many courts have diluted the intended effect of the Court's decision. *Price Waterhouse* is no longer an analytical framework for the rare case where an employee has proven that discrimination, as a matter of fact, played at least a part in an adverse decision. Rather, *Price Waterhouse* has become a lifeline for meritless discrimination claims. As Justice Kennedy forewarned, Plaintiffs with no evidence of discrimination and properly facing judgment as a matter of law under Rules 56 or 50 stretch to label insensitive remarks "direct evidence." With the confusion and dilution of *Price Waterhouse*, not only do such claims find their way to the jury, they do so with the employer bearing the burden of persuasion to avoid a complete loss.

*Gagnon* reflects the confusion stemming from *Price Waterhouse* in the extreme. The Eighth Circuit has now decided that one comment, considered in a complete vacuum, by a recommending authority who had no plausible causal connection to the alleged discriminatory act can, standing alone, prove illegal discrimination. In short, under the purported imprimatur of *Price Waterhouse*, words alone have become illegal discriminatory acts. The Court should hear this case to provide needed direction to the lower courts as to what evidence triggers the *Price Waterhouse* "mixed motive" analysis.

### A. *Price Waterhouse* – The Source Of The Confusion

In a plurality decision, the sharply divided Court in *Price Waterhouse* split the analytical road in employment discrimination cases. The plurality (Justice Brennan writing for Justices Marshall, Blackmun and Stevens) held that when "mixed motives" drive an employment decision, the *McDonnell Douglas / Burdine* analysis does not apply. *Price Waterhouse*, 490 U.S. at 245-47. If an employee proves that an illegal criterion was a "motivating factor" in an employment decision, the burden of persuasion shifts to the employer to prove by a preponderance of the evidence that the same decision would have been made absent the illegal criterion. *Id.* at 258.[5] Significantly, however, the plurality did not meaningfully articulate what evidence is required to shift this burden, offering only that: (1) the facts in *Price Waterhouse* were enough to shift the burden; and (2) "stray remarks" are not enough. *Id.* at 251-52.

Justice O'Connor's deciding concurrence agreed with the plurality's burden-shifting framework, but clarified the type of evidence needed to trigger the "mixed motive" analysis. *See id.*, at 261-79. According to Justice O'Connor, the only means to a "mixed motive" analysis is through "*direct evidence* that decisionmakers placed substantial

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[5] The plurality further held that when an employer carries its burden of persuasion, the employer avoids liability outright. *Id.* This changed with Congress' 1991 amendments to Title VII, specifically 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B). The 1991 amendments imposed some liability even when the employer succeeds in proving the "same decision" defense. These statutory amendments, however, do not speak to that portion of *Price Waterhouse* addressing the evidence necessary to trigger a "mixed motive" case.

negative reliance on an illegitimate criterion in reaching their decision." *Id.* at 277 (emphasis added). However, while she described what "direct evidence" is not,[6] Justice O'Connor did not make clear what "direct evidence" actually is. It is within this void that a confusing, split jurisprudence has evolved in the lower courts.

The dissent of Justices Kennedy, Rehnquist, and Scalia asserted that the *McDonnell Douglas / Burdine* framework fully addressed the different means through which an employee could prove illegal discrimination. *See id.*, at 279-95. They opined that altering that framework by making the employer prove a negative in a limited subset of cases would only confuse courts, juries, and litigants. *Id.* They were correct.

## B. The Resulting Confusion in the Circuits

Lower courts have devised differing standards to define what evidence triggers *Price Waterhouse*. These standards are too inconsistent in rule and application to fully capture in this Petition. A summary of the confusion, however, demonstrates the point. In *Fernandez v. Costa Brothers Masonry, Inc.*,[7] the First Circuit described the split in the standards on this issue as follows: (1) the "classic" standard; (2) the "animus plus" standard; and (3) the "animus" standard. *See id.*, at 579-583. The Ninth Circuit recently added a fourth position, that there are no required evidentiary standards triggering the "mixed motive" analysis.

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6 *See id.*, at 277.

7 199 F.3d 572 (1st Cir. 1999).

### 1. The "Classic" Standard

Courts following the "classic" standard hold that "direct evidence" triggers a *Price Waterhouse* case, and "direct evidence" actually means "direct evidence." In other words, "the term signifies evidence which, if believed, suffices to prove the fact of discriminatory animus without inference, presumption, or resort to other evidence." *Id.* at 582. Comments that do not meet this test cannot trigger the *Price Waterhouse* analysis. For example, in *Langley v. Jackson State University*,[8] a white professor claimed that the following comments constituted "direct evidence":

- the chairperson of her department said "she doesn't see why black students feel that they need to have white advisors," and "black people are overlooked at Jackson State to give white faculty more rights;" and

- the same person said she "would prefer an all-black institution so there would be less competition between blacks and whites."

*Id.* at 1075. The Fifth Circuit held that while "these comments are indicative of race-consciousness, they do not constitute direct evidence that discriminatory animus motivated in part any of the decisions." *Id.*

The Fifth and Tenth Circuits adhere to the "classic" standard, and the Seventh and Eleventh Circuits have

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[8] 14 F.3d 1070 (5th Cir. 1994).

periodically taken this approach.[9] In substance, the First Circuit has also followed the "classic" standard.[10]

## 2. The "Animus Plus" Standard

Courts following the "animus plus" standard require a "direct evidence" label to trigger a *Price Waterhouse* analysis, but hold that "direct evidence" can consist of both direct and circumstantial evidence. *Fernandez*, 199 F.3d at 582. Such evidence must merely "(1) reflect directly the alleged discriminatory animus and (2) bear squarely on the contested employment decision." *Id.*[11] For example, in

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[9] See *Fernandez*, 199 F.3d at 582, *citing Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999); *Haas v. ADVO Sys., Inc.*, 168 F.3d 732, 734 n.2 (5th Cir. 1999); *EEOC v. Whiltel, Inc.*, 81 F.3d 1508, 1514 (10th Cir. 1996); *Nichols v. Loral Vought Sys., Corp.*, 81 F.3d 38, 40 (5th Cir. 1996); *Carter v. Three Springs Resid. Treatment*, 132 F.3d 635, 641 (11th Cir. 1998); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994).

[10] *See Fernandez*, 199 F.3d at 583 (finding statement "I don't need minorities and I don't need residents on the job" was capable of two plausible interpretations – one innocent and one discriminatory – and was, therefore, not "direct evidence"); *Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 65 (1st Cir. 2002)("This circuit has made clear that inherently ambiguous statements do not qualify as direct evidence.").

[11] In form, the *Gagnon* decision appears to adopt this position. In substance, the evidence in *Gagnon* does not constitute "direct evidence" under any of the various standards adopted by the circuits.

*Thomas v. National Football League Players Association*,[12] the D.C. Circuit held in a Title VII retaliatory discharge case that the close temporal proximity between the protected activity and discharge, the decisionmaker's security measures to keep the plaintiffs out of the workplace immediately after termination, and the decisionmaker's possession of a memorandum alleging race discrimination written by the plaintiffs triggered the *Price Waterhouse* analysis. *Id.* at 202-06. The Fourth and D.C. Circuits apply this test, and on occasion the Third, Seventh, and Eighth Circuits have as well.[13]

### 3. The "Animus" Standard

Until the Ninth Circuit's recent opinion discussed below, courts following the "animus" standard had forged the most lenient means to the "mixed motive" framework. *Fernandez*, 199 F.3d at 582. If "the evidence (whether direct or circumstantial) is tied to the alleged discriminatory animus, it need not bear squarely on the challenged employment decision" to trigger the *Price Waterhouse* framework. *Id.*

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12 131 F.3d 198 (D.C. Cir. 1997).

13 *See Fernandez*, 199 F.3d at 582, *citing Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1189, 120 S.Ct. 1243, 146 L.Ed.2d 101 (2000); *Thomas*, 131 F.3d at 204; *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 513 (3d Cir. 1997), *cert. denied*, 523 U.S. 1074, 118 S.Ct. 1516, 140 L.Ed.2d 669 (1998); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044 (7th Cir. 1999); *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 436 (8th Cir. 1998).

For example, in *Tyler v. Bethlehem Steel Corp.*,[14] an age discrimination case, the Second Circuit applied the *Price Waterhouse* analysis based on evidence that the company showed preferential treatment to some younger employees, referred to a group of employees as the "Young Tigers," and at times referred to "'youth' in a positive manner" in employee appraisals. *Id.* at 1179, 1187. The Second Circuit, and at times the Eighth Circuit, have espoused this view.[15]

### 4. The Ninth Circuit's Position – No Defined Standard

On August 2, 2002, the Ninth Circuit created a fourth position as to what triggers application of a "mixed motives" analysis. *See Costa v. Desert Palace, Inc.*, --- F.3d ---, 2002 WL 1772643 (9th Cir. 2002). In a 7 to 4 *en banc* decision, the Ninth Circuit held that "direct evidence" is not required to trigger a "mixed motive" case, and there are *no* particular evidentiary means to such an analysis. *See id.*, at ** 4-11. The majority concluded that the 1991 amendments to Title VII overruled *Price Waterhouse* in its entirety, including any "direct evidence" requirement to trigger shifting the burden of persuasion to the employer. *Id.* at ** 4-7. The majority further concluded that Justice O'Connor's "direct evidence" requirement in *Price Waterhouse* was merely a "passing

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[14] 958 F.2d 1176 (2d Cir. 1992), *cert. denied*, 506 U.S. 826, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992).

[15] *See Fernandez*, 199 F.3d at 582, *citing Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir. 1997); *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992); *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017-18 (8th Cir. 1999); *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993).

reference," and all courts that interpret *Price Waterhouse* as requiring such evidence to trigger a "mixed motive" case are simply wrong. *Id.* at ** 8-11.[16]

The four dissenting judges in *Costa* believe that Justice O'Connor's "direct evidence" requirement was, and still is, a controlling requirement when deciding whether the "mixed motive" framework applies to a particular case. *Id.* at ** 21-24 (Gould, J., dissenting). The dissent correctly noted that while the 1991 amendments to Title VII overruled some of *Price Waterhouse* – specifically, its holding that an employer carrying its burden completely avoids liability – it did not touch the Court's "direct evidence" requirement as the triggering mechanism for a "mixed motive" case. *Id.*

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[16] The majority opinion's dismissal of Justice O'Connor's "direct evidence" requirement disregards the legal effect of her concurrence in *Price Waterhouse*. In *Marks v. United States*, 430 U.S. 188 (1977), the Court provided a rule to guide lower courts in interpreting plurality opinions of the Court, such as *Price Waterhouse*. The Court stated:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .

*Id.* at 193. Applying this principle in *Marks to Price Waterhouse*, Justice O'Connor's concurrence requiring "direct evidence" as the evidentiary prerequisite to a "mixed motive" analysis was the narrowest ground supporting the judgment of the Court. *See Costa*, 2002 WL 1772643, at * 21-22 (Gould, J., dissenting); Fernandez, 199 F.3d at 580. Those courts holding otherwise, such as the Ninth Circuit, have misinterpreted *Price Waterhouse*.

### 5. Confusion Within the Circuits

Neither the First Circuit's description of the split in authority nor the Ninth Circuit's recent decision in *Costa* fully capture the confusion that reigns in the lower courts. The circuits are internally inconsistent in deciding what standard is required to trigger the *Price Waterhouse* rubric.

For example, the Seventh Circuit's *post-Price Waterhouse* decisions are all over the board. In *Randle v. LaSalle Telecommunications, Inc.*,[17] the court held that "direct evidence" was required to trigger *Price Waterhouse*, and affirmed the following test: "[D]irect evidence, if believed by the trier of fact, will prove the particular fact in question *without reliance upon inference or presumption*." *Id.* at 569 (emphasis added). However, in *Wichman v. Board of Trustees of Southern Illinois University*,[18] the court held that when a comment is capable of multiple inferences, one innocuous and one illegal, such evidence is "direct evidence" so long as it "can be interpreted as an acknowledgment of the defendant's discriminatory intent." *Id.* at 801, *quoting Kormoczy v. HUD*, 53 F.3d 821, 824 (7th Cir. 1995).

Similar confusion exists in the Eleventh Circuit. *Compare Schoenfeld v. Babbitt*, 168 F.3d 1257, 1266 (11th Cir. 1999)("only the most blatant remarks, whose intent could be nothing other than to discriminate" constitute "direct evidence" triggering *Price Waterhouse*), *with Wright v. Southland Corp.*, 187 F.3d 1287, 1293 (11th Cir.

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17 876 F.2d 563 (7th Cir. 1989).

18 180 F.3d 791 (7th Cir. 1999), *vacated on other grounds*, 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807 (2000).

1999)("'direct evidence,' in the context of employment discrimination law, means evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic."). The court's lengthy opinion in *Wright*, which sought to clarify the definition of "direct evidence" within the Eleventh Circuit, is so extraordinarily convoluted that the only nugget of "guidance" it provides is that "direct evidence" is not required to show "direct evidence." *See id.*, at 1293-1303.

Confusion exists in the Eighth Circuit as well. For example, in *Gagnon* the court found that an isolated comment with affirmative action overtones by the man who had promoted the plaintiff just days earlier was "direct evidence" of a discriminatory animus. Yet, a year before the *Gagnon* decision, the Eighth Circuit held that an arguably ageist comment by the plaintiff's supervisor did not prove that the supervisor harbored a discriminatory bias, considering that the supervisor hired the plaintiff at age 52, and the plaintiffs' co-workers were all over 40. *See Sprenger v. Federal Home Loan Bank of Des Moines*, 253 F.3d 1106, 1112-13 (8th Cir. 2001)(affirming summary judgment for the employer).

The same internal confusion exists within virtually every other circuit, and this confusion leads to troubling consequences. Depending on which standard a district court elects to follow in judging the evidence of a particular case, that case could result in either judgment as a matter of law against the employee, or a trial with the *employer* bearing the burden of proof on causation. Unfortunately, that is where *Price Waterhouse* stands today.

## II. Review is Necessary Because the *Gagnon* Decision Conflicts With the Decisions of This Court

This Court has emphasized that Title VII is not a "general civility code." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *Oncale v. Sundowner Offshore Services, Inc.*, 528 U.S. 75, 80 (1998). Title VII exists to prevent discriminatory *acts*.[19] Under the purported imprimatur of *Price Waterhouse*, the Eighth Circuit's opinion in this case stand these bedrock principles, and *Price Waterhouse*, on their collective head.

Gagnon's case rested entirely on Mendenhall's alleged comment: "I'm not going to pay him that, he's a white guy, isn't he? If he were a woman or a minority, I would have to pay him." Mendenhall further stated: "That's absurd. Nobody gets more than ten percent."

As an initial matter, such remarks are not true "direct evidence" of Mendenhall's state of mind, as they require inference to reach an illegal motive. Specifically, the comment requires an inference that Mendenhall actually gave preferential treatment to minorities and women over white men. Such an inferential leap of faith ignores human experience, common sense, and the evidence. To make this leap, one must find that:

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[19] *See Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring)("The legislative history [of Title VII] makes it clear that Congress was attempting to eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts.").

- Mendenhall had a discriminatory animus against his own race and gender;

- Mendenhall developed the animus in a matter of days after he promoted Gagnon;

- Mendenhall would have actually supported a 50% raise request, which was 2 ½ times beyond the outermost point of company policy, for a minority or female employee during a hiring and expense freeze, even though there was no evidence that he (or anyone else at Sprint) ever did that; and

- Mendenhall's statement that "Nobody gets more than ten percent" meant nothing – it simply disappears from the overall comment at issue.

Under the Eighth Circuit's opinion, circumstantial evidence can become "direct evidence" via an inferential bridge, even when there are no evidentiary trusses supporting that bridge. The ambiguous Mendenhall comment is not the "direct evidence" that an employer "placed substantial reliance on factors whose consideration is forbidden by Title VII" that Justice O'Connor intended. *See Price Waterhouse*, 490 U.S. at 301.

More troubling than its presumed assessment of Mendenhall's thoughts is the Eighth Circuit's labeling a comment "direct evidence" without any causal link whatsoever between words and action. The adverse action in this case claimed by Gagnon was his 11% raise, which he felt should have been 50%. Mendenhall made two decisions: (1) he would not *recommend* a 50% raise; and (2) he would, and did, *recommend* a 21% raise over 6 months. Mendenhall did

not make the ultimate decision on Gagnon's raise. Kurtze, another white man, made that decision.

To link Mendenhall's refusal to recommend a 50% increase with Kurtze's decision to give Gagnon a flat 11% raise, one must again plunge into the depths of speculative inferences. Kurtze never heard Mendenhall's alleged comment, so he could not have acted on it. Kurtze rejected Mendenhall's recommendation in favor of a lesser raise. Assuming, *arguendo*, that Mendenhall's recommendation was actually tainted with discriminatory bias, his bias had no plausible causal link to Kurtze's decision. To find otherwise, a factfinder must conclude that had Mendenhall recommended a 50% raise, Kurtze would have rubber stamped the recommendation, notwithstanding that Kurtze rejected a 21% recommendation. Common sense and the actual facts in this case belie such an inference.

Justice O'Connor stated, "the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a *reasonable* factfinder could draw an inference that the decision was made *'because of'* the plaintiff's protected status." *Price Waterhouse*, 490 U.S. at 278 (emphasis added). In *Price Waterhouse*, the plaintiff produced evidence of the necessary link between discriminatory words and action. There, the decisionmakers (1) heard the unambiguously sexist comments from many recommending partners; (2) relied on the comments in making an adverse decision; and (3) told plaintiff that she needed to act more feminine to become a partner. *Id.* at 231-36. The Eighth Circuit paid no heed to this causation requirement, as Gagnon offered no such evidence in the instant case.

In substance, the Eighth Circuit's ruling is that Mendenhall's comment constitutes "direct evidence" because it could conceivably offend the sensibilities of a jury. Whether the evidence is truly "direct" matters not. Context matters not. Causation matters not. In the Eighth Circuit under *Gagnon*, Title VII has become a "general civility code" that now makes politically incorrect words actionable discrimination.

## III. Ending the Confusion – A Return to the Basics

With this Petition, Sprint asks the Court to conclude that the Eighth Circuit erroneously applied *Price Waterhouse* when it found Mendenhall's comment "direct evidence" requiring submission of the case to the jury. Sprint also requests that the Court use this case to (1) clarify that "direct evidence" is required to trigger a "mixed motive" analysis, and (2) provide uniform guidance to the lower courts as to what constitutes "direct evidence" for purposes of triggering the "mixed motive" analysis.

The Ninth Circuit's recent opinion in *Costa* underscores the timeliness of this Petition. In *Gagnon,* the Eighth Circuit, like virtually all other circuits, held that "direct evidence" is required to trigger the "mixed motive" rubric. Since the Eighth Circuit's *Gagnon* decision, the Ninth Circuit in *Costa* has taken the bold position that there is *no* "direct evidence" requirement to trigger a "mixed motive" case. Accordingly, there is now a split in authority among the circuits as to whether "direct evidence" is required at all to trigger the "mixed motive" analysis. The Court should take

the opportunity in this case to confirm that "direct evidence" is, indeed, the required means to a "mixed motive" case.[20]

The Court should then address and provide uniformity on the primary issue troubling the circuits in this area – what is "direct evidence" that triggers the *Price Waterhouse* "mixed motives" analytical framework? Specifically, the Court should clarify what "direct evidence" *is*, not just provide examples of what it is not. *See Price Waterhouse*, 490 U.S. at 277.

The lower courts' decisions in the past 13 years prove that requiring anything less than true "direct evidence" of discriminatory animus has been a recipe for confusion. Accordingly, the Court should clarify that when Justice O'Connor stated that "direct evidence" is required to trigger *Price Waterhouse*, she meant "direct evidence." The comment(s) at issue, when taken in context, must reflect a clear, unambiguous discriminatory intent pertaining to the decision at issue in the case. If the comment(s) require inference or presumption to arrive at a discriminatory intent, they are not "direct evidence." When looking at the comment(s) in context, if reasonable minds could differ as to whether they reveal a true discriminatory animus, they are not "direct evidence."[21]

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[20] Pursuant to Supreme Court Rule 14.1(a), the issue raised in the *Costa* opinion must be decided to resolve the split in the circuits on the issue presented by this case, and is fairly included in the question presented in this case.

[21] Justice O'Connor described the evidence in *Price Waterhouse* as follows: "It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several

The Court should also grant review to clarify that "direct evidence" requires a causal connection between the animus reflected in the comment(s) and the ultimate employment decision. If the animus had no plausible impact on the decision, it cannot constitute "direct evidence" of illegal discrimination. Justice O'Connor made clear that such a causal link must be present before evidence becomes "direct evidence" shifting the burden of persuasion to the employer. *Price Waterhouse,* 490 U.S. at 277-78. This causation requirement distinguishes between discrimination "in the air" versus discrimination "brought to ground and visited upon" an employee. *See id.*, at 251. As demonstrated by *Gagnon*, the lower courts have lost sight of this requirement.

The Mendenhall comment satisfies neither of the two requirements. The Eighth Circuit erred in labeling this comment "direct evidence" that triggers a *Price Waterhouse* "mixed motive" analysis. Sprint requests that the Court grant its Petition, resolve the conflicts among and within the circuit courts, and based upon that resolution, reverse the Eighth Circuit's opinion and reinstate the district court's grant of JAML to Sprint.

## CONCLUSION

The Eighth Circuit's opinion in this case is not an isolated anomaly, but a glaring example of an epidemic of confusion sweeping through the courts. The lower courts are

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of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was told by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid." *Id.* at 272-73 (emphasis original).

simply lost in their quest to discern what evidence is required to trigger a *Price Waterhouse* "mixed motive" analysis. This case, buttressed by the Ninth Circuit's August 2, 2002 decision in *Costa*, demonstrate that the Court should promptly clarify this confusion. For the reasons stated above, Sprint respectfully prays that the Court issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**[Filed May 22, 2002]**

**No. 01-2505**

| | |
|---|---|
| William E. Gagnon, Jr., Appellant, | ) |
| v. | ) |
| Sprint Corporation, etc., et al., Appellees. | ) |

## ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petitions for rehearing by the panel is also denied.

(5128-010199)

Order entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**[Filed March 19, 2002]**

**No. 01-2505**

| | |
|---|---|
| William E. Gagnon, Jr., Appellant, | ) |
| v. | ) |
| Sprint Corporation, doing business as Sprint Spectrum Finance Corporation, doing business as Sprint PCS, Appellees. | ) |

Appeal from the United States District Court for the Western District of Missouri

**JUDGES:**
Before MORRIS SHEPPARD ARNOLD, BEAM, RILEY, Circuit Judges.

## OPINION

BEAM, Circuit Judge.

William Gagnon brought this reverse race discrimination and retaliation case under Title VII, 42 U.S.C. § 2000e *et seq.*, the Missouri Human Rights Act ("MHRA"), and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Gagnon appeals the district court's issuance of judgment as a matter of law ("JAML") at the close of plaintiff's case in favor of Sprint PCS on his discrimination and retaliation claims under Title VII and the MHRA. Gagnon also appeals the district court's grant of summary judgment in favor of Sprint PCS on his USERRA discrimination and retaliation claims[1]. Upon a de novo review of the record, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

## I. BACKGROUND

On January 31, 1997, Gagnon retired from the United States Army as a Lieutenant Colonel after serving more than twenty-one years. Gagnon then worked at Cubic Applications, Inc. ("Cubic"), a defense contractor. He was in Cubic's employ for three months prior to becoming associated with Sprint PCS.

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[1] We also note that there are two pending motions taken with the case. Appellant's Motion for Judicial Reassignment is denied. We do not question Judge Whipple's impartiality in this matter and find nothing in the record to otherwise suggest that he conducted the proceedings unfairly. Appellant's Motion for Waiver of Costs is granted pursuant to 38 U.S.C. § 4323(h).

Gagnon began working for Sprint PCS in March 1997. Sprint PCS hired Gagnon as a curriculum developer in it's training department ("TAPS") at a starting salary of $44,100 with a short-term incentive potential ("STI") of $3,000. Gagnon was directly supervised by Kathleen Wilder, the director of the department, from his initial starting date in March until his promotion. Gagnon was promoted in October 1997 to CBT-Manager, a new management position in the department. At the time of Gagnon's promotion, Wilder was out of the office on maternity leave and Jim Keenan, the department manager, and Lynn Meredith-Ball, another manager in Wilder's department, assumed Wilder's responsibilities as director of the training group. In Wilder's absence, Vice-President Jim Mendenhall was instrumental in promoting Gagnon to the manager position.

Because Gagnon's position was new at Sprint PCS, it did not have a dollar figure assigned for compensation. Therefore, Gagnon submitted a job description for the position, with the assistance of Meredith-Ball, to the Human Resources Department ("HR") so that a compensation amount could be assigned. The Sprint PCS compensation group within HR established a market reference point ("MRP") of $66,000 with a STI of $9,500. The MRP is not a guaranteed salary point, but rather a targeted reference point for a tenured employee in that position.

As a matter of procedure at Sprint PCS, when a salary increase greater than ten percent is sought, a Compensation Exception Request form stating the amount of the raise requested is completed, sent to HR for a recommendation, then forwarded to a vice president in charge of the department for a recommendation. Then, finally the appropriate chief

officer or his designee reviews all recommendations and makes final decisions on salary increases. In conjunction with Gagnon's promotion, Meredith-Ball prepared a Compensation Request Form to raise Gagnon's salary from $44,100 to $66,000, reflecting the full MRP established by the compensation group. HR did not support Meredith-Ball's proposed raise to the full $66,000 but instead proposed a salary at eighty-five percent of MRP, the equivalent of a twenty-five percent raise for Gagnon. Meredith-Ball and Julie Moylan, the HR Compensation Manager, signed the proposed compensation form on October 1, 1997. At that time, the form reflected Meredith-Ball's request for a base salary increase to $66,000 and Moylan's recommended twenty-five percent increase. Meredith-Ball submitted the request with both proposals to Vice-President Mendenhall for his approval. Mendenhall rejected both proposals on the compensation exception request form.

Mendenhall's rejection of the initial compensation request is an important part of Gagnon's claim of discrimination. According to trial testimony, Mendenhall looked at the document with the attachments and threw it back across his desk at Meredith-Ball stating, "I'm not going to pay him that, he's a white guy, isn't he?" Mendenhall further allegedly stated, "If he were a woman or a minority, I would have to pay him, but I don't have to pay him." Meredith-Ball recalls Mendenhall refusing to discuss his stated position and clearly stating, "I'm not going to pay him. He's just a white guy." Mendenhall also stated, "That's absurd. Nobody gets more than ten percent."

After failing to obtain approval of either the full $66,000 salary for Gagnon or the proposed twenty-five

percent increase recommended by Moylan, Meredith-Ball revised the compensation form to request an eleven percent raise followed by an automatic ten percent raise in six months. HR approved the eleven percent raise but did not endorse the automatic ten percent raise in six months, suggesting that Gagnon seek a ten percent raise in six months, dependent on his performance. Meredith-Ball took the revised compensation request form to Mendenhall who approved Meredith-Ball's recommendation in its entirety, including the automatic raise in six months. The form was then presented to Al Kurtze, the chief operating officer. Kurtze had the final vote on this compensation decision. Kurtze agreed with HR's recommendation and approved only the immediate eleven percent raise, with the suggestion that the automatic increase in six months be processed with separate approval action.

Gagnon filed a claim with the Equal Employment Opportunity Commission ("EEOC") in April 1998 because he was dissatisfied with his compensation increases. Gagnon claims his workplace environment deteriorated after he filed his EEOC claim and it became difficult for him to timely complete work tasks because Wilder stopped seeking his advice and stopped discussing department issues with him.

In August 1998, Gagnon and Meredith-Ball organized a discussion with four other Sprint PCS employees outside the training department building. Gagnon and Meredith-Ball informed the group of employees, all of whom possessed prior military experience, of Sprint PCS's growth outside Wilder's department. During that discussion, various statements indicated (although all parties are not in agreement) that Gagnon and Meredith-Ball advised the four employees that Wilder was uncomfortable with the number of

employees in her department with prior military experience and, therefore, would not promote anyone with such a background. However, the record also reflects that during a managers' meeting two months prior, Wilder stated there was a perception among some employees in the department that employees *had* to be retired military to advance. Gagnon responded at the managers' meeting that the perception was not true. Wilder also admitted at this managers' meeting that she was uncomfortable that some of her employees thought they were being treated differently because they were *not* military. Wilder later told Gagnon she was uneasy with the number of military employees in the department.

As a result of the alleged statements made during the meeting outside the training department regarding Wilder's comfort, or lack thereof, Gagnon and Meredith-Ball were placed on written reminder, a form of reprimand. This written reminder prohibited Gagnon and Meredith-Ball from seeking a promotion or transfer without a vice president's approval for a period of six months. Gagnon claims the written reminder, in addition to Wilder's failure to give him a promised ten percent raise in July, and the continued isolation of Gagnon in his department constituted retaliation.

Gagnon subsequently filed this lawsuit charging Sprint PCS with violating USERRA for setting his initial salary $1,000 lower due to his lack of corporate experience and for disciplining him following the meeting outside the Sprint PCS training department building. Gagnon also charged Sprint PCS with violating Title VII and the MHRA for denying his salary raise upon receiving the promotion to CBT Manager.

## II. DISCUSSION

The grant of a judgment as a matter of law is reviewed de novo, applying the same standards used by the district court. *Fogelbach v. Wal-Mart Stores, Inc.*, 270 F.3d 696, 700 (8th Cir. 2001). Pursuant to Rule 50, judgment as a matter of law should only be granted when a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. Fed. R. Civ. P. 50(a)(1). "In making this determination, the court must draw all reasonable inferences in favor of the nonmoving party without making credibility assessments or weighing the evidence." *Phillips v. Collings*, 256 F.3d 843, 847 (8th Cir. 2001).

### A. Discrimination Claim

Plaintiffs like Gagnon pursuing claims of discrimination under Title VII have two models under which they may proceed. First, a plaintiff can proceed under the three-stage, burden-shifting standard set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Under this standard, Gagnon must first establish a prima facie case of discrimination. Once the prima facie case is established, the burden shifts to Sprint PCS to articulate a non-discriminatory reason for the adverse employment action. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). If Sprint PCS articulates such a reason, Gagnon must respond with sufficient evidence that the proffered reason was really a pretext for intentional discrimination. *Id.* At all times under this model, the burden of persuasion remains on Gagnon, the plaintiff. *Id.*

Alternatively, Gagnon can proceed under the mixed-motive standard set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), if he is able to produce "direct evidence that an illegitimate criterion . . . 'played a motivating part in [the] employment decision.'" *Cronquist v. City of Minneapolis*, 237 F.3d 920, 924 (8th Cir. 2001) (alterations in original) (quoting *Price Waterhouse*, 490 U.S. at 258). Once Gagnon establishes such direct evidence, the burden shifts to Sprint PCS to demonstrate by a preponderance of the evidence that it would have reached the same employment decision absent any discrimination. *Cronquist*, 237 F.3d at 924. As modified by section 107 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(g)(2), the mixed-motive model allows for declaratory relief, injunctive relief, attorney's fees and costs once Gagnon meets his initial burden regarding direct evidence. 42 U.S.C. § 2000e-5(g)(2)(B)(i). Thus, Sprint PCS is liable for discrimination under this model upon direct evidence that it acted on the basis of a discriminatory motive. *Breeding v. Gallagher and Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999). Whether or not Sprint PCS satisfies its burden to show by a preponderance that it would have reached the same employment decision absent any discrimination is only relevant to determine whether the court may award full relief including damages, court ordered admissions, reinstatement, hiring, promotion or other such relief. *Id.*; 42 U.S.C. § 2000e-5(g)(2)(A) & (B)(ii). We apply this analysis to Gagnon's MHRA discrimination claim as well as his Title VII claim. *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830, 836 (8th Cir. 2002).

Because this is a claim of reverse race discrimination, Gagnon additionally must show "that background

circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Duffy v. Wolle*, 123 F.3d 1026, 1036 (8th Cir. 1997) (quoting *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985)). However, if Gagnon fails to make this showing, he may still proceed by adducing sufficient evidence of intentional discrimination against *him*, in order to proceed beyond the prima facie case stage of litigation. *Id.* In other words, he is clearly able to proceed in a reverse discrimination claim if there is direct evidence of discrimination.

Gagnon first argues that judgment as a matter of law was improper because Mendenhall's statement "I'm not going to pay him. He's just a white guy," is direct evidence of unlawful reverse discrimination. *See Price Waterhouse*, 490 U.S. at 270-73. The district court held that JAML was appropriate because Kurtze was the decision-maker, not Mendenhall, and there was no evidence that Kurtze knew of Mendenhall's comment or acted on it.

Direct evidence is evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude in such a way that the fact finder could infer that the attitude was more likely than not a motivating factor in the employer's decision. *Walton v. McDonnell Douglas Corp.*, 167 F.3d 423, 426 (8th Cir. 1999). However,

Not all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action in question to support such an inference. For example, stray remarks in the workplace, statements by

nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself will not suffice.

*Id.* (internal quotations omitted).

Courts look beyond the moment a decision was made in order to determine whether statements or comments made by other managerial employees played a role in the ultimate decisionmaking process. "An employer cannot escape responsibility for willful discrimination by multiple layers of paper review, when the facts on which the reviewers rely have been filtered by a manager determined to purge the labor force of [protected] workers." *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1147 (7th Cir. 1993).

While Kurtze's decision may have ultimately been free of any discriminatory animus, we cannot sterilize a seemingly objective decision when earlier discriminatory decisions lead to the adverse employment action. *See Webb v. St. Louis Post-Dispatch*, 51 F.3d 147, 149 (8th Cir. 1995) (finding that the employer's failure to accommodate the plaintiff's nervous condition possibly constituted discriminatory treatment even though Post's ultimate decision to terminate Webb was based upon his unexcused absenteeism); *Stacks v. Southwestern Bell Yellow Pages*, Inc., 27 F.3d 1316, 1318, 1324-25 (8th Cir. 1994) (finding a supervisor's comment that "women . . . were the worst thing" that had happened to the company to be direct evidence of discrimination supporting an inference that an illegitimate criterion was a motivating factor in an employment decision, even though the division manager made the ultimate decision to terminate the plaintiff); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1057-58 (8th Cir. 1993) (looking beyond the moment the decision to fire the

plaintiff was made, which was free from discrimination, because the plaintiff's supervisor had treated her differently than her male counterparts).

The district court stated that the evidence introduced at trial revealed that Kurtze, not Mendenhall, was the decisionmaker for Gagnon's October 1997 raise and potential fifty percent increase. We fail to find any evidence of this in the record. According to the trial testimony, Meredith-Ball submitted the proposal for the full base salary increase to $66,000 to Mendenhall and he rejected the proposal because Gagnon was "only a white guy." After this rejection, the proposal was amended to reflect an eleven percent increase followed by an automatic ten percent increase in six months. This second proposal was the only compensation increase put before Kurtze. Gagnon alleges discrimination based upon the fact that Mendenhall rejected the initial base increase proposal submitted by Meredith-Ball. That initial proposal was never before Kurtze because of Mendenhall's blanket rejection and alleged discriminatory comments. Thus, Mendenhall *was* the final decisionmaker as to the initial decision to deny Gagnon a base increase from $44,100 to $66,000 in October 1997.

Without judging the credibility of these witnesses, we believe there is sufficient evidence to place before a jury Sprint PCS's reasons for rejecting Gagnon's initial salary increase in October 1997. Since there exists direct evidence of discrimination, Sprint PCS bears the burden of showing that it would have reached the same employment decision absent any discrimination. *Price Waterhouse*, 490 U.S. at 258. In other words, Sprint PCS must show the proffered raise from $44,100 to $66,000 would have been reduced to an eleven percent increase absent Mendenhall's discriminatory

remarks. This determination must be made by the finder of fact, and therefore judgment as a matter of law was inappropriate.

**B. Retaliation Claim**

Gagnon claims Sprint PCS unlawfully retaliated against him after his EEOC claim in April 1998 by issuing a reprimand in the form of a written reminder and by failing to approve additional compensation increases as Wilder had allegedly promised. Gagnon claims this constituted a hostile work environment and affected Gagnon's future career prospects at Sprint PCS. "Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, makes it unlawful for an employer to discriminate against an employee, for among other things, 'because she has opposed any practice made an unlawful employment practice by this subchapter.'" *Buettner v. Arch Coal Sales Co.*, 216 F.3d 707, 713 (8th Cir. 2000) (alteration in original) (quoting 42 U.S.C. § 2000e-3). Absent direct evidence of discrimination invoking the mixed-motive analysis of Price Waterhouse, the burden-shifting analysis of McDonnell Douglas applies to claims of retaliation. *Buettner*, 216 F.3d at 713.

To establish a prima facie case of retaliatory discrimination, a plaintiff must show: (1) [he] engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) a causal connection existed between participation in the protected activity and the adverse employment action.

*Id.* at 713-14 (citations omitted). Effectively, the same standards apply to Gagnon's MHRA retaliation claims.[2] *Id.* at 714.

Gagnon introduced evidence at trial regarding his account of the poor treatment he received from Wilder and others in his department after he filed a charge with the EEOC. He also received a written reminder on August 27, 1998, which Gagnon claims further evidences the hostile environment because it was issued one month after Sprint PCS filed its response to his EEOC claim. The district court held that Gagnon failed to establish that either of these actions rose to the level of actionable retaliation under controlling Eighth Circuit authority.

"An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." *Spears v. Missouri Dep't of Corr. and Human Res.*, 210 F.3d 850, 853 (8th Cir. 2000) (citation omitted). "Termination, reduction in pay or benefits, and changes in employment that significantly affect an employee's future

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[2] We recognize that Missouri Revised Statute § 213.070(2) prohibits retaliation "in *any* manner against *any* person" and that this language is broader than that found under Title VII, section 2000e-3. Mo. Rev. Stat. § 213.070(2) (emphasis added). *See Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622, 625-26 (Mo. 1995). However, we do not reach the outer boundaries of section 213.070 in this matter as Gagnon is a person who falls within both provisions, as does the alleged manner of retaliation. Thus, we reach the same conclusion under both Title VII and the MHRA in this case.

career prospects meet this standard . . . ." *Id.* (citation omitted).

It is well-settled in this circuit that ostracism and rudeness by supervisors and co-workers do not rise to the level of an adverse employment action. *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 969 (8th Cir. 1999) (finding general allegations of coworker ostracism are not sufficient to rise to the level of an adverse employment action); *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 693 (8th Cir. 1997) (holding that disrespect and ostracism did not rise to the level of actionable adverse employment action because there was no tangible change in duties or working conditions). Gagnon failed to establish that the alleged ostracism by Wilder and coworkers rose to the level of actionable retaliation. Gagnon's testimony reflects that Wilder ignored him and that it became difficult for him to function as a member of her team, but provides no evidence that this behavior had any impact on his job title, salary, benefits, or any other material aspect of his employment. *See Spears*, 210 F.3d at 854 (finding the plaintiff's transfer to a new location merely an inconvenience and not actionable under Title VII because there was no evidence that her transfer had any impact on her job title, salary, benefits, or any other material aspect of her employment).[3]

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[3] We again note that Gagnon failed to establish that the alleged ostracism by Wilder and co-workers rose to the level of actionable retaliation under the MHRA because he failed to provide sufficient evidence as a matter of law that "as a direct result [of protected activity], he . . . suffered any damages due to [this] act of reprisal." *Keeney*, 911 S.W.2d at 625; *Buettner*, 216 F.3d at 715 n.8; *Cross v. Cleaver*, 142 F.3d 1059, 1076 (8th Cir. 1998).

Gagnon further alleges the August 1998 written reminder significantly affected his future career prospects because it limited his ability to seek promotions or transfers. In fact, Gagnon alleges that as a result of the written reminder, his future career prospects were eliminated altogether. We question whether the effect of the written reminder constitutes an adverse employment action but note that even unfavorable evaluations might be actionable if the employer subsequently uses them as a basis to detrimentally alter the terms or conditions of employment. *Id.* "Papering" an employee's file with negative reports and reprimands may sufficiently support a claim of retaliation if they adversely affect or undermine an employee's position. *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997).

In granting JAML to Sprint PCS on this issue, the district court relied on our decision in *Flannery v. Trans World Airlines, Inc.*, 160 F.3d 425 (8th Cir. 1998). The district court cited Flannery for the proposition that "an admonishment to an employee is not actionable retaliation." Our holding in Flannery was not so broad. We determined in Flannery that admonishment and removal of complimentary letters from an employee's personnel file did not constitute an adverse employment action in that case because the employee failed to allege that these actions resulted in reduced salary, benefits, seniority, or responsibilities, or any other materially significant disadvantage. *Id.* at 428. Gagnon, on the other hand, alleges that the written reminder resulted in the outright closing of job openings to him and the loss of opportunity to compete for any position, which, if true, might support a claim of retaliation.

Our final inquiry on Gagnon's claim of retaliation is whether he has raised sufficient evidence as a matter of law connecting the adverse employment action to his EEOC claim. The written reminder was issued after Sprint PCS investigated the circumstances surrounding the meeting outside of the department held by Gagnon and Meredith-Ball. On its face, the written reminder clearly sets forth the reasons for its issuance - because Gagnon, as a member of the management team, created a false perception of discrimination and Sprint PCS was concerned with his level of professionalism, personal effectiveness and team conduct. Gagnon places great emphasis on the fact that the written reminder was issued one month after Sprint PCS filed its response to his EEOC claim. But, "generally, more than a temporal connection . . . is required to present a genuine factual issue on retaliation." *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). Thus we look to Gagnon's remaining evidence to determine whether he has satisfied his burden as a matter of law.

We find as a matter of law that Gagnon fails to prove any causal connection between his EEOC claim of discrimination and the issuance of the written reminder. Even though Gagnon did not violate a company policy when he gathered with his fellow employees outside of the building, Sprint PCS certainly had the authority to issue a reminder regarding the effect of that meeting, given the fact that Gagnon was in a management position. Sprint PCS clearly set forth its reason for the issuance of the reminder and identified several personal traits of Gagnon needing improvement. Contrary to Gagnon's argument, the fact that Wilder made a comment regarding her level of comfort with military employees in her department is not dispositive, as it was made

to colleagues at a managers' meeting, and furthermore does not connect the issuance of the written reminder with the filing of Gagnon's EEOC claim.

Gagnon further claims Wilder had no factual basis for stating in the written reminder that Gagnon created the false perception of discrimination. But Gagnon himself testified that he had a discussion with Wilder and Kim Klosak during their investigation of the matter which suggests that Wilder did make factual findings regarding the meeting held by Gagnon and Meredith-Ball. Finally, Gagnon claims that Wilder's failure to secure a promised raise for Gagnon evidences her retaliatory motive. Again, the evidence doesn't create such an inference. Gagnon testified that Wilder did attempt to increase his compensation in January 1998, he received a small merit increase in April 1998, and he was aware that there were "no guarantees" in Wilder's efforts to secure a raise. Although Gagnon did not receive his allegedly promised July increase, the only connection he makes supporting an inference of retaliation at that point is the timing in connection with his EEOC claim, and that is not enough as a matter of law.

We find the record empty of any evidence connecting Gagnon's EEOC claim filed in April 1998 and the issuance of the written reminder in August 1998. Thus, JAML was appropriate and the opinion of the district court is affirmed on this point. *Kipp v. Missouri Highway Transp. Comm'n*, 280 F.3d 893, Nos. 01-1814/1922, slip op. (8th Cir. Feb. 20, 2002) (granting JAML because the plaintiff failed to establish the causal link necessary to make out a prima facie case of retaliation).

**C. USERRA Discrimination Claim**

In reviewing a grant of summary judgment, we review the decision of the district court de novo. *Buettner*, 216 F.3d at 713. The question before us on appeal is whether the record, when viewed in the light most favorable to the non-moving party, shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

The USERRA, enacted in 1994 to improve the Veterans' Reemployment Rights Act ("VRRA"), prohibits employment discrimination on the basis of military service. *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 311 (4th Cir. 2001); 38 U.S.C. § 4311 et. seq. Section 4311(a) provides:

> A person who is a member of . . . [or] has performed . . . in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership . . . .

The USERRA replaced the "sole cause" standard of the VRRA, which "protected the employee-reservist against discriminations like discharge and demotion, motivated *solely* by reserve status." *Knowles v. Citicorp Mortgage, Inc.*, 142 F.3d 1082, 1085 n.3 (8th Cir. 1998) (emphasis in original) (citation omitted); *Newport v. Ford Motor Co.*, 91 F.3d 1164, 1167 (8th Cir. 1996). Under the USERRA, an employer violates the act when a person's membership in the uniformed services is a *motivating factor* in the employer's action, "unless the employer can prove that the action would have

been taken in the absence of such membership, application for membership, service, application for service, or obligation for service." 38 U.S.C. § 4311(c)(1).

In Gagnon's claim of discrimination under the USERRA, he asserts that because of his military background, he received a lower starting salary. The district court held that because Sprint PCS provided evidence of a factor other than Gagnon's military service to explain the disparity in his initial pay, Sprint PCS's motion for summary judgment was warranted. However, our inquiry does not carry us that far into the analysis. We find Gagnon fails to state a claim of discrimination under the USERRA. Gagnon has not been denied "initial employment, reemployment, retention in employment [or] promotion," as covered under section 4311(a). Thus, his only basis for a claim of discrimination under section 4311(a) is that Sprint PCS denied him a benefit of employment due to his prior service membership. Gagnon claims he was paid $1,000 less than his peers at Sprint PCS. The term "benefit," as defined by the USERRA, specifically excludes wages or salary for work performed. 38 U.S.C. § 4303(2). Thus, Gagnon has no basis for maintaining his claim of discrimination under the USERRA.

**D. USERRA Retaliation Claim**

Gagnon also alleged retaliation under the USERRA based upon Sprint PCS's actions following Gagnon's internal complaints of activity he perceived as illegal USERRA discrimination. The district court held that the USERRA only applies to a retaliation claim if the employee has taken a *formal* enforcement action as provided in section 4323. Thus, the court held that Gagnon was unable to maintain a cause of

action for retaliation under the USERRA because he did not file a complaint with the secretary of labor nor commence a civil action against Sprint PCS. We disagree with this initial conclusion. Under a plain reading of the statute, we hold that Gagnon's internal complaints suffice as protected activity under the USERRA.

The USERRA standard for retaliation claims is set forth in 38 U.S.C. §§ 4311(b) and 4311(c)(2):

> (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, . . .
>
> (c) An employer shall be considered to have engaged in actions prohibited -- (2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, . . . or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, . . . or exercise of a right.

Gagnon correctly asserts on appeal that the appropriate standard of proof in a discrimination or retaliation claim under the USERRA is the so-called "but for" test and that the burden of proof is on the employer, once the employee's case is established. *Sheehan v. Dep't of Navy*, 240 F.3d 1009,

1013 (Fed. Cir. 2001). The legislative history and treatment by other circuits support this evidentiary scheme, set forth below, for USERRA cases. *See NLRB. v. Transportation Mgmt. Corp.*, 462 U.S. 393, 401, 76 L. Ed. 2d 667, 103 S. Ct. 2469 (1983) (modified by *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 129 L. Ed. 2d 221, 114 S. Ct. 2251 (1994)). We apply this precedent:

> The procedures established by precedent require an employee making a USERRA claim of discrimination to bear the initial burden of showing by a preponderance of the evidence that the employee's military service was "a substantial or motivating factor" in the adverse employment action. If this requirement is met, the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason.

*Sheehan, 240 F.3d at 1013* (citations omitted).

Unlike the McDonnell Douglas framework adopted by the district court in this matter, the procedural framework and evidentiary burdens set out in section 4311 shift the burden of persuasion, as well as production, to the employer. "Thus in USERRA actions there must be an initial showing by the employee that military status was at least a motivating or substantial factor in the [employer's] action, upon which the [employer] must prove, by a preponderance of evidence, that

the action would have been taken despite the protected status." *Sheehan*, 240 F.3d at 1014.

One question before us is whether Gagnon's internal complaints constitute an "action to enforce a protection afforded any person" under the USERRA. Under both USERRA and Title VII, a plaintiff must first assert that she engaged in some form of protected activity in order to determine whether the employer retaliated against the employee. However, the district court mistakenly held that the first Title VII inquiry is whether a charge of harassment was filed.[4] The court then went on to hold that although Title VII also protects actions in opposition to perceived conduct

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[4] The elements of a claim of retaliation in violation of Title VII are the following: (1) the plaintiff filed a charge of harassment *or engaged in other protected activity*; (2) the plaintiff's employer subsequently took adverse employment action against the plaintiff; and (3) the adverse action was causally linked to the plaintiff's protected activity. *Scusa*, 181 F.3d at 968; *Cross v. Cleaver II*, 142 F.3d 1059, 1071 (8th Cir. 1998). "Protected activities" under Title VII include much more than merely filing a formal charge of harassment. *Fierros v. Texas Dep't of Health*, 274 F.3d 187, 194 (5th Cir. 2001) (recognizing that internal discrimination complaints and use of employer's internal administrative processes are clearly protected activities for purposes of a Title VII retaliation claim); *Raniola v. Bratton*, 243 F.3d 610, 624 (2d Cir. 2001) (finding internal complaint to be a qualified activity protected from retaliation by Title VII and citing authority noting that "Congress sought to protect a wide range of activity in addition to the filing of a formal complaint") (citation omitted); *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1255 (10th Cir. 2001) (finding informal complaints to superiors constitute protected activity under Title VII).

prohibited by Title VII, the USERRA protects only formal enforcement of rights in its prohibition of retaliatory conduct. It is clear, though, that like Title VII, many actions may form the basis of protected activities giving rise to a claim of retaliation under the USERRA. Under section 4322(a)(2)(A), the USERRA anticipates that people may take alternate steps or "actions" to seek enforcement of the USERRA, prior to filing a formal complaint with the secretary of labor or filing a civil action.[5] Various informal activities could occur in order for an employee to determine that their employer has not complied with or will not comply with the USERRA. The formal procedures of enforcement are merely another alternative under the USERRA once an employee makes this determination.

We find further support for the proposition that an "action to enforce a protection afforded any person" under the USERRA subsumes more than just formal complaints filed with the secretary of labor or civil actions in *Brandsasse v. City of Suffolk, Virginia*, 72 F. Supp. 2d 608, 619 (E.D. Va. 1999). In Brandsasse, the plaintiff was a city police officer who was refused consideration for a promotion allegedly because of discrimination he incurred as a result of his Army Reserve obligations. *Id.* at 611-12. The court concluded that

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[5] "A person who claims that such person is entitled under this chapter to employment or reemployment rights or benefits with respect to employment by an employer; and such employer has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter, . . . may file a complaint with the Secretary in accordance with subsection (b), and the Secretary shall investigate such complaint." 38 U.S.C. § 4322(a)(1) & (2)(A).

sufficient allegations were made by the plaintiff to support a cause of action for retaliation. *Id.* at 619.

The basis of the plaintiff's claim in Brandsasse was that he took steps to enforce his rights under the statute by speaking with the director of personnel, and hired counsel to pursue his claims under the USERRA. The defendants subsequently began a retaliatory investigation. *Id.* at 612, 619. The district court in Brandsasse did not dismiss the claim because the plaintiff had not *formally* filed a claim with the secretary of labor nor filed a civil action against the defendants. In fact, the court concluded that raising internal complaints and seeking the advice of outside counsel "seems to be exactly the sort of adverse employment action which the statute contemplates." 72 F. Supp. 2d at 620.

We agree with the assessment in Brandsasse and find that Gagnon, too, engaged in just the sort of conduct which the statute contemplates. We also previously established that a written reminder may constitute an adverse employment action. Thus, Gagnon's final burden was to establish that his military status was at least a motivating or substantial factor in Sprint PCS's issuance of the written reminder. *Sheehan*, 240 F.3d at 1014. This is where Gagnon falls short. Gagnon does not refer us to any causal evidence supporting his claim of retaliation under the USERRA. Our review of the record suggests that there is no evidence connecting Gagnon's internal complaints of discrimination and the issuance of the written reminder following the meeting held outside of the department by Gagnon and Meredith-Ball. Because Gagnon is unable to meet his burden as a matter of law to establish a prima facie case of retaliation under the USERRA, the district court grant of summary judgment is affirmed.

**E. Evidentiary & Discovery Issues**

Gagnon finally urges us to instruct the district court to vacate its ruling denying admission into evidence Plaintiff's Exhibit 306 containing salary information of Sprint PCS employee Frank Gardi. Gagnon also requests that the district court on remand (1) vacate its rulings on Gagnon's motion to compel regarding the attorney-client and work-product privileges asserted by Sprint PCS due to the involvement of its in-house counsel Martin; (2) vacate the protective order entered over the deposition of Paul Bass; (3) vacate its ruling denying admission into evidence of Plaintiff's Trial Exhibits 37, 38, 39, 252, and 294 involving communications with Martin.

A district court's refusal to compel discovery is reversed upon a showing of gross abuse of discretion. *Wilson v. Int'l Bus. Machs. Corp.*, 62 F.3d 237, 240 (8th Cir. 1995). We find no abuse of the court's discretion concerning the motion to compel the documents protected by the work-product privileges asserted by Sprint PCS. The district court conducted an *in camera* review of specific documents and twice entertained substantial briefing by both parties. Even though Gagnon argues that these documents are not subject to the work-product privilege because they were created in the ordinary course of Sprint PCS's business, the district court found they were prepared in anticipation of litigation and therefore protected from discovery. The district court's holding, based upon a careful review of the documents, as well as both parties' briefing on the matter, is not a gross abuse of discretion, and we therefore affirm.

Gagnon also challenges the protective order issued by the district court concerning the deposition of Paul Bass. Paul Bass was one of the individuals involved in the internal investigation of Gagnon's claim of retaliation. The district court granted Sprint PCS's protective order, holding that the investigation by Bass, at the direction of Martin, was in anticipation of litigation and is covered by the attorney work-product privilege. Gagnon, citing *Upjohn Co. v. United States*, 449 U.S. 383, 395, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981), argues that the attorney-client privilege only protects disclosure from communications, not disclosures of the underlying facts by those who communicated with the attorney. Gagnon claims Bass is a fact witness and not Sprint PCS's corporate representative, thus he is outside the scope of the attorney-client privilege. The district court, however, did not abuse its discretion in making a contrary finding, noting that the investigation conducted by Bass was an integral part of in-house counsel Martin's investigation. We affirm.

Finally, Gagnon challenges several evidentiary rulings made by the district court at trial. We review a trial court's evidentiary rulings under the abuse of discretion standard, according the district court substantial deference. *Shelton v. Consumer Prods. Safety Comm'n*, 277 F.3d 998, 1009 (8th Cir. 2002).

At trial, Gagnon sought to introduce five documents reflecting e-mails and letters between Sprint PCS's in-house counsel, Gagnon and Meredith-Ball concerning Gagnon's complaint of retaliation. Gagnon mistakenly argues on appeal that the district court excluded these documents based upon the fact that they were communications with in-house counsel

and were thus privileged. The transcript reveals that prior to trial, the district court sustained the motion in limine because the judge failed to see the relevancy of these documents. We also fail to see how these documents are relevant to Gagnon's "totality of the circumstances" argument that he raises on appeal. Gagnon is not making a claim concerning the internal investigation conducted by Sprint PCS regarding Gagnon's claim of discrimination or retaliation. We hold that the district court did not abuse its discretion in excluding Exhibits 37, 38, 39, 252, and 294 in its pre-trial ruling.

Gagnon's last evidentiary challenge is the district court's exclusion of evidence regarding a salary increase given to another Sprint PCS employee after the dates relevant to Gagnon's employment at Sprint PCS. Gagnon sought to introduce this evidence to prove that Sprint PCS does in fact entertain raises above fifty percent, contrary to proffered trial testimony. However, we find the district court did not abuse its discretion when it found that any evidence of Sprint PCS's policies regarding compensation in 1999 or 2000 are irrelevant in the instant case as to compensation policies in 1997 and 1998. We affirm the ruling of the district court.

## III. CONCLUSION

We reverse the district court's grant of Sprint PCS's motion for JAML on Gagnon's claim of discrimination under Title VII and the MHRA. The district court's grant of JAML on Gagnon's claim of retaliation under Title VII and the MHRA, its summary judgment on Gagnon's claims of discrimination and retaliation under the USERRA, as well as its rulings regarding pre-trial discovery and trial evidentiary

matters stand affirmed. We remand for further proceedings consistent with this opinion.

## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MISSOURI**
**WESTERN DIVISION**

**[Filed May 10, 2001]**

**No. 99-0683-CV-W-1**

| | |
|---|---|
| William E. Gagnon, | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| Sprint Corp., et al., | ) |
| Defendants. | ) |
| | ) |

**ORDER**

Plaintiff William E. Gagnon ("Gagnon") filed this lawsuit against Defendant Sprint Corporation, d/b/a Sprint Spectrum L.P. ("Sprint Corporation") and Sprint Spectrum Finance Corporation d/b/a Sprint PCS ("Sprint PCS") (collectively, "Sprint") on July 20, 1999. Gagnon alleged five basic claims against Sprint involving: (1) discrimination under the Uniform Services Employment and Reemployment Rights Act ("USERRA,'), 38 U.S.C. §§ 4301-33; (2) retaliation under USERRA; (3) race and gender discrimination under Title VII and the Missouri Human Rights Act ("MHRA") (alleging that he was discriminated when denied an

(alleging that he was discriminated when denied an approximate fifty percent raise); and (4) retaliation under Title VII and the MHRA. On January 4, 2001, the Court granted Sprint's motion for partial summary judgment on Gagnon's USERRA claims, leaving the Title VII and the MHRA discrimination and retaliation claims for trial. Trial on the remaining claims commenced on January 22, 2001, and on January 25, Gagnon concluded his evidence and rested his case. At that time, Sprint moved for the Court to enter judgment as a matter of law ("JAML") against Gagnon pursuant to Rule 50(a)(1). In moving for JAML, Sprint argued that Gagnon had not established a legally sufficient evidentiary basis for a reasonable jury to find for him on the following: (1) his race and gender discrimination claim under Title VII and the MHRA; (2) his retaliation claim under Title VII and the MHRA; (3) his claim for compensatory/ emotional distress damages; and (4) his claim for punitive damages. After hearing arguments from counsel for Gagnon and Sprint, the Court granted Sprint's motion for JAML on Gagnon's Title VII and MHRA claims of race and gender discrimination and retaliation and follows with this Order.[1]

## I. BACKGROUND

The following is not intend to be a complete recitation of all of the evidence at trial but is a synopsis for purposes of the present Order.

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[1] Counsel for Sprint, John J. Yates and Joseph H. Knittig, submitted a proposed order to which counsel for Gagnon, Henry R. Cox, Don R. Lolli and Benjamin K. Byrd, were allowed to object. The Court, after considering the proposed order and objections, issues the present Order.

Sprint hired Gagnon, a white male, in March of 1997 to work as a curriculum developer in Sprint's training department (also known as the Training and Professional Studies department, or "TAPS"). Sprint paid Gagnon an annual salary of $44,100 with a short term incentive ("STI") of $3,000. The decision to hire Gagnon was made by Jim Keenan ("Keenan"), a manager in the TAPS department, (2) Kathleen Wilder ("Wilder"), the director of the TAPS department, and (3) Jim Mendenhall ("Mendenhalr'), a vice president over the TAPS department. Prior to working for Sprint, Gagnon worked for a defense contractor, CUBIC Applications ("CUBIC"), following his retirement from the United States Army. The evidence presented at trial showed that Gagnon earned $42,000 a year at CUBIC.

After he began working at Sprint in March 1997, Sprint created a new management position in the TAPS department known as CBT-Manager. Before the position was formally created, Wilder unofficially selected Gagnon to work as the CBT-Manager, which was scheduled to be financed, created, and filled in early 1998. In September and October of 1997, Wilder did not work at Sprint because of maternity leave. During the time of Wilder's maternity leave, another manager of the TAPS department, Lynn Meredith-Ball ("Meredith-Ball"), assisted in handling Wilder's director duties.[2] The evidence also showed that during the same time

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[2] In his objections to the proposed order, Gagnon argues that in Wilder's absence Meredith-Ball was named co-director of the TAPS department and was charged with authority concerning compensation issues. The Court is not concerned with the title that Meredith-Ball held but recognizes her duties included temporarily assisting with the position left vacant while Wilder took maternity

period, and extending to the end of 1997, Sprint PCS was in a hiring freeze. Despite the hiring freeze and Wilder's absence, Mendenhall accelerated the creation of the CBT-Manager position and directed that Gagnon be promoted into the position in October of 1997.

Upon the creation of the CBT-Manager position, Sprint Human Resource Department ("HR") set a "market reference point" ("MRP") for the position. The MRP is a targeted reference point, or guide, for a tenured employee in that position. The MRP is not a guaranteed salary point. The MRP for the curriculum developer position was $42,000, with an STI of $3,000. The MRP for the CBT-Manager position was $66,000, with an STI of $9,500. Accordingly, at the time of his promotion, Gagnon was moving from a position with a base salary MRP of $42,000 to a job with a base salary MRP of $66,000.

The evidence introduced at trial also showed that a Sprint policy governed the raise an employee was eligible to receive upon a promotion (the "Promotion Policy"). However, both Gagnon and Meredith-Ball testified that they were unaware of the Promotion Policy at the time of Gagnon's promotion in October of 1997. The Promotion Policy found in Sprint's "Salary Management Guidelines," stated:

> When an employee's base salary after merit pay consideration is below the market reference point for the new position, a

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leave.

> promotional increase of 5% may be granted if the promotion is within a normal progression (i.e. analyst to senior analyst). For "extraordinary" promotional increases between positions, the maximum total increase should not exceed 20%. Please note: promotional increases greater than 10% must be reviewed and approved by the appropriate Chief Officer or their designee.

Sprint's Exhibit 74, p. 13, Promotion Policy (also contained in Plaintiffs Exhibit 43). Under the Promotion Policy, and as Gagnon, Meredith-Ball, and Julie Moylan ("Moylan") all agreed, the "Chief Officer or [his] designee" was the decision maker on an employee pay increase above ten percent. As a matter of process, in seeking a salary increase greater than ten percent, a Compensation Exception Request form stating the amount of the raise requested is completed, sent to HR for a recommendation, a vice president in charge of the department for a recommendation and, lastly, to the "Chief Officer or [his] designee" to review all recommendations and make the decision on the salary increase.

In the present case, Plaintiff's Exhibit 10 was the Compensation Exception Request form that resulted in Gagnon's receiving an eleven percent raise upon his promotion in October of 1997. According to the evidence, Kurtze was the decision maker for that raise. However, before Kurtze made that decision, Meredith-Ball prepared and submitted a form requesting an immediate eleven percent raise for Gagnon with an additional ten percent raise after six months, which Mendenhall supported. Although agreeing with the immediate eleven percent raise, Moylan, who

reviewed the Compensation Request Forms for the HR recommendation component of the Promotion Policy process, "*strongly disagree[d]*" with the additional ten percent request. (emphasis in original) Instead of approving in advance the additional raise, Moylan recommended that Sprint award Gagnon an eleven percent raise and allow him to seek a ten percent raise in six months, which would be dependant upon performance. Thus, there were two recommendations before Kurtze: (1) the eleven percent raise and ten percent automatic increase following six months that Meredith-Ball and Mendenhall recommended; and (2) the eleven percent recommendation from Moylan. Kurtze rejected the recommendation of Meredith-Ball and Mendenhall and approved Moylan's recommendation to only award Gagnon an immediate eleven percent increase. The evidence showed that Kurtze's decision to only approve an immediate eleven percent raise complied with the Promotion Policy.

Further evidence was introduced that Gagnon received an additional salary increase of fifteen percent in January of 1998. And, three months after the fifteen percent raise, in April of 1998, Gagnon received a two percent merit salary increase. In summary, the evidence introduced at trial showed that over a period of approximately six months Gagnon's base salary increased from $44,100 to $58,735 (an increase of thirty-three percent). And, Gagnon's STI increased from $3,000 to $9,500 (an increase of more than 200%).

Despite the uncontroverted evidence set forth above, Gagnon claimed that his October 1997 pay raise was the product of race and gender discrimination. Specifically, Gagnon complained because he did not receive an immediate raise from $44,100 to $66,000 (an increase in pay of

approximately fifty percent to the full MRP for his position) upon his promotion in October of 1997. The basis for Gagnon's race and gender discrimination claim follows.

Prior to submitting the eleven percent Compensation Exception Request form[3] during Wilder's maternity leave, Meredith-Ball initiated an effort[4] to increase Gagnon's salary approximately fifty percent[5] during a hiring freeze at Sprint.

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[3] Plaintiff's Exhibit 10, *supra*.

[4] The parties dispute whether Wilder directed the action or whether Meredith-Ball took the action on her own initiative. The distinction is lost upon the Court but, for reasons unknown, is a matter of great importance to the two parties.

[5] Gagnon objects to the use of"fifty percent" in the proposed order. Instead, Gagnon argues that Meredith-Bali's testimony states that the request was a thirty-three percent "base-to-base" increase using a calculation provided by Wilder and HR. And, Gagnon argues, the proposed order omits Sprints admission that the proposal "constituted a [thirty-five percent] increase. Plaintiff's Trial Exhibit 95."

Once again, the semantics of different terms or language used by both parties is not understood and severely frustrates the Court. The Court's math finds the increase from $44,000 to $66,000 is $22,000, or *half of $44,000*. Arguments by each party's counsel regarding this type of diminutive issue plagued the litigation of this matter. The Court believes the argued issues were not in the best interest of each counsel's client but instead were the result of the animosity existing between opposing counsel. Whether "fifty," "thirty-three," or "thirty-five" percent is used does not alter the actions taken by Meredith-Ball, Gagnon, Mendenhall, or Kurtze, and, as such, will not be addressed further in this Order.

Meredith-Ball completed a Compensation Exception Request form[6] in order to increase Gagnon's salary from $44,100 to the full MRP of $66,000 and the $9,500 STI. Meredith-Ball testified that she personally delivered the fifty percent compensation request to Mendenhall at his office to receive his recommendation. According to Meredith-Ball, Mendenhall refused to support her recommendation and remarked that Gagnon "was just a white guy," and "that if he was a woman or a minority then Sprint would have to pay him."[7]

The evidence at trial did not show that Meredith-Ball submitted the fifty percent raise request to Kurtze, the decision maker, for approval. And, no evidence was submitted to show Kurtze had knowledge of the Mendenhall "white guy" remark when he made his decision regarding Gagnon's eleven percent pay raise. Instead, the evidence showed Meredith-Ball revised the Compensation Exception Request form to make a request[8] within the SMG's Promotion Policy. As previously addressed in this Order, Kurtz did not approve the initial request even though it possessed Mendenhall recommendation but instead favored a flat eleven percent raise.

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[6] Plaintiff's Exhibit 9.

[7] At the same time that he rejected the fifty percent request recommended by Meredith-Ball, Mendenhall rejected a twenty-five percent increase recommended by Moylan of HR. *See* Plaintiff's Exhibit 9.

[8] The previously discussed eleven percent raise and automatic ten percent raise after six months.

Subsequently, on April 21, 1998, Gagnon filed a Charge of Discrimination ("Charge") with the Equal Employment Opportunity Commission ("EEOC") contending that his eleven percent raise was the product of race and gender discrimination.

Approximately five months following the filing of his Charge, the "porch incident" occurred. Specifically, at approximately 2:00 p.m. on August 7, 1998, Gagnon and Meredith-Ball organized a "meeting" or "discussion" with four employees in the TAPS department on the outside porch of the Sprint building. The employees gathered to meet with Gagnon and Meredith-Ball were Cory Aylor ("Aylor"), Bill Pearce ("Pearce"), Steve Hammack ("Hammack") and Brian Schlaak ("Schlaak"). These employees were new employees at Sprint PCS, having worked at Sprint for less than six months. The four employees, who were military veterans and friends of Gagnon, were recruited to Sprint by Gagnon and ultimately hired into the organization by Wilder. The evidence introduced at trial revealed that Gagnon and Meredith-Ball called these employees out of work and to a patio, or porch, in front of the Sprint building to inform the employees about transferring to potential jobs outside of Wilder's department.[9]

Following the porch discussion, two managers in the TAPS group, Dale Coffman ("Coffman") and Keenan, contacted Wilder to advise her about the porch incident. They reported to Wilder that Gagnon and Meredith-Ball met with

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[9] The evidence introduced at trial showed that Sprint had a policy that prevented employees from transferring, without approval from their department head, until they had been with the company for at least a year.

four employees out of the workplace and told them that she (Wilder) was uncomfortable with the number of military employees in the department and they could not advance in the TAPS group under her. Gagnon and Meredith-Ball advised the four employees that they needed to look outside the TAPS group if they were interested in advancement opportunities. Because the reports concerned Wilder, she decided to investigate the porch incident along with Kim Klosak ("Klosak") from HR.

In investigating the porch incident, Wilder and Klosak interviewed all four individuals who met on the porch along with Gagnon and Meredith-Ball. Both Pearce and Aylor reported that Gagnon and Meredith-Ball, together,[10] told the four employees that Wilder was uncomfortable with the number of military employees in the department and, therefore, they could not advance in the TAPS group under Wilder and should look outside the TAPS group if they were interested in advancement opportunities. Hammack reported that he did not hear Gagnon and Meredith-Ball make such comments but he was not paying attention to what was being discussed. But, Hammack confirmed that before the porch incident, Meredith-Ball told him Wilder was uncomfortable

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[10] Gagnon objects that the testimony of Wilder and Klosak failed to determine who made the comments. Of the four individuals summoned outside the Sprint building by Gagnon and Meredith-Ball, the Court notes that evidence shows that at least one individual did not hear Gagnon or Meredith-Ball make any comments and others attribute the comments to one or both (Meredith-Ball and Gagnon). The Court also notes that the only evidence of the comments not being made was testimony by *Meredith-Ball and Gagnon.*

with the number of military in the department. Schlaak arrived to the porch approximately 10-15 minutes late and missed most of the Gagnon and Meredith-Ball discussion. At trial, Gagnon and Meredith-Ball denied making the statements discussed above and maintained that they were merely sharing job opportunities with the four individuals.

As a result of the investigation, and with the recommendation of Klosak, Wilder issued a "written reminder"[11] to Gagnon and Meredith-Ball. The impact of the reprimand was a temporary placement of the written reminder in Gagnon's personnel file for six months and a prohibition on transfers to other jobs within Sprint for six months without first securing vice-presidential approval.[12] During his cross-examination at trial, Gagnon affirmatively admitted that he did not lose any pay[13] or other benefits of employment as a result of the written reminder. The evidenced showed that Gagnon maintained the same job position, was not demoted or suspended and did not suffer a material employment

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[11] The evidence showed that a "written reminder" is a formal reprimand at Sprint.

[12] Pursuant to the prohibition, Sprint refused to allow Gagnon to apply for a promotion or transfer while the written reminder was in effect. Plaintiff's Exhibits 50 and 305.

[13] Gagnon objects that he did not receive a ten percent raise "assur[ed]" to him by Wilder. Given the conduct of Gagnon and Meredith-Ball in the "porch incident," the Court does not find the failure to award an "assured" raise a loss in pay.

disadvantage.[14] The written reminder for the"porch incident" expired after six months.

Gagnon also testified some coworkers were cold towards him. Specifically, Gagnon claims Wilder called him a "white guy" on two occasions and was not as nice to him after her maternity leave. In addition to Wilder, Gagnon also claims some other coworkers were not as nice to him as they once were, but only specifically identified Keenan at trial. According to Gagnon, Keenan did not socialize with him, did not say "hello" to him in the hallway and would talk to employees that worked under Gagnon without first going to Gagnon. At trial, Gagnon claimed the written reminder, ostracism by his coworkers and failure to award him an additional ten percent raise were all forms of retaliation in response to his filing a Charge with the EEOC. But, Gagnon did not offer any evidence to causally link the written reminder and his differences with his coworkers to his

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[14] Gagnon testified that during the six month period, he asked Wilder to exempt him from the written reminder so he could pursue a potential lateral transfer to another job in October of 1998. Wilder did not excuse him from the written reminder. Gagnon admitted that he knew nothing about the job, and did not even know if the job was filled. Wilder, on the other hand, testified that the job at issue was not even an open, available job. In other words, there was no lateral job for Gagnon to which he could have successfully applied. In addition, Gagnon testified that he thought that during the time frame of the porch incident, he deserved yet another ten percent raise because Wilder told him in January of 1998 that she would consider going for another ten percent raise for him. On cross-examination, however, Gagnon admitted that he was not entitled to another ten percent raise, and that Wilder never "guaranteed" him such a raise. *See supra* n. 13.

Charge. In fact, with respect to his coworkers, Gagnon testified that he had no evidence that his fellow employees even knew that he filed his Charge.

## II. JAML STANDARDS

In considering a motion for JAML, as when considering a motion for summary judgment, the appropriate inquiry is: "'[w]hether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Kinserlow v. CMI Corp.*, 217 F.3d 1021, 1025 (8th Cir. 2000) (upholding a district court's motion for judgment as a matter of law at the close of all of the evidence) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Rule 50(a) allows the trial court to enter JAML "' [i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party....'" *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1049 (8th Cir. 2000) (reversing lower court's entry of jury verdict and entering judgment as a matter of law) (citing Fed. R. Cir. P. 50(a)(1)). In viewing the evidence, the court "'must assume all facts that the nonmoving party's evidence tends to show, give [him] the benefit of all reasonable inferences, and assume that all conflicts in the evidence were resolved in [his] favor.'" *Concord*, 207 F.3d at 1049-50 (quoting *Hathaway v. Runyon*, 132 F.3d 1214, 1220 (8th Cir. 1997)).

However, when considering a motion for JAML, the nonmoving party is entitled only to the benefit of "reasonable" inferences. *Gill*, 217 F.3d at 1025. A "reasonable" inference

is one that"may be drawn from the evidence without resort to speculation." *Id.* (citations omitted). When the nonmovant's case rests solely on speculation and conjecture without any evidentiary support, JAML must be granted. *Concord*, 207 F.3d at 1050. While entitled to all supporting inferences, the nonmoving party is not given "'the benefit of unreasonable inferences or those at war with the undisputed facts.'" *Id.* (quoting *Sip-Top Inc. v. Ekco Group. Inc.*, 86 F.3d 827, 830 (8th Cir. 1996). "'[T]he court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.'" *Gill*, 217 F.3d at 1025. Thus, JAML must be granted if there can be but one reasonable conclusion as to the verdict when considering the evidence. *Concord*, 207 F.3d at 1050.

## III. DISCUSSION

### A. JAML-RACE/GENDER DISCRIMINATION CLAIM

Gagnon's Title VII and MHRA claim of discrimination based on his gender, male, and race, Caucasian ("white") is commonly referred to as a reverse discrimination claim. In reverse discrimination cases, the plaintiff must present evidence to demonstrate the employer is "that unusual employer who discriminates against the majority." *Duffy v. Wolle*, 123 F.3d 1026, 1036 (8th Cir. 1997) (quoting *Murray v. Thistledown Racing .Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985).[15]

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[15] *See also Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986) ("When a plaintiff who is a member

The evidence relied upon by Gagnon for his reverse discrimination claim was an alleged comment made by Mendenhall that "he (Gagnon) is just a white guy." In addition to the Mendenhall comment, the following evidence was also introduced at trial: the fifty percent raise submitted by Meredith-Ball was excessively greater than the permissible raises under Sprint's Promotion Policy; and Gagnon received raises that were within the Promotion Policy.[16] As previously stated, Mendenhall made the comment while rejecting a recommended fifty percent raise of Gagnon's salary. Gagnon argued at trial that the Mendenhall comment was direct evidence for his reverse discrimination claim. However, the comment, even if made, does not automatically cause Gagnon's reverse discrimination case to be a Title VII/ MHRA direct evidence claim.

In order for the Mendenhall comment to be received as direct evidence, Gagnon, must show that Mendenhall was (1) a decision maker and (2) the comment reflected a discriminatory animus such that a jury could infer it was a

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of a favored group alleges disparate treatment, the courts have adjusted the prima facie case to reflect this specific context by requiring showing of 'background circumstances [which] support the suspicion that the defendant is that unusual employer who discriminates against the majority.'") (citations omitted).

[16] Under the Promotion Policy, which was not disputed, a five percent raise upon promotion was the general rule. Gagnon received two "exceptions" from the general rule which he admitted were "out of the norm" (his eleven percent raise in October of 1997, and his fifteen percent raise in January of 1998).

motivating factor in the decision at issue. "Statements may constitute evidence of impermissible motive only when they are made by decisionmakers in the [decisionmaking] process and reflect a discriminatory animus such that a jury could infer it was a motivating factor in the [decisionmaking] process." *Herrero v. St. Louis Univ. Hosp.*, 109 F.3d 481,484 (8th Cir. 1997); *see also Walton v. McDonnell Douglas Corp.*, 167 F.3d 423,426 (8th Cir. 1999) ("Not all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action in question to support such an inference. For example, 'stray remarks in the workplace,' 'statements by nondecisionmakers,' or 'statements by decisionmakers unrelated to the decisional process itself' will not suffice.") (citations omitted).

The evidence introduced at trial revealed that Kurtze, and not Mendenhall, was the decisionmaker for Gagnon's October 1997 raise and potential fifty percent raise.[17] The testimony of witnesses, including Gagnon and Meredith-Ball, and according to the plain language of the Promotion Policy, Kurtze was vested with the exclusive authority to decide Gagnon's raise. In fact, according to the evidence, Kurtze refused to approve Mendenhall's recommendation[18] that Gagnon receive an immediate eleven percent raise (in October of 1997) and an automatic ten percent raise after six months.

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[17] Among other witnesses, Gagnon and Meredith-Ball admitted this fact at trial.

[18] The evidence introduced at trial showed that recommendations for Gagnon's salary increase were made by Meredith-Ball, Moylan and Mendenhall.

Instead, Kurtze only approved an eleven percent raise. Armed with recommendations and choices, Kurtze made his independent decision. Significantly, no evidence was introduced that Kurtze knew of the Mendenhall comment or acted on it. Accordingly, there was no evidence to link a comment by a nondecisionmaker, Mendenhall, to the decision made by Kurtze.

The fact that Kurtze was the decision maker and not Mendenhall does not end the Court's direct evidence analysis. Proper supporting evidence of statements or evidence of individuals beneath the decisionmaker can constitute evidence of discrimination. *See Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1056-60 (8th Cir. 1993). In cases like *Kientzy*, if the evidence shows that an innocent decisionmaker was merely the "conduit," or "cat's paw," of another's prejudice, then a non decisionmaker's statement or conduct could conceivably support a discrimination claim. *See id.* at 1060. But, the conduit situation was not present in this case. There was no evidence that Mendenhall acted upon a bias against white men by refusing to recommend a fifty percent raise for Gagnon or evidence that Mendenhall used Kurtze, the decision maker, as a mere "conduit." Indeed, the evidence was quite to the contrary as Kurtze rejected Mendenhall's recommendation of an immediate eleven percent raise with an automatic ten percent raise after six months. Unlike *Kientzy* and other similar cases, there was no evidence that the decisionmaker essentially acted as a "rubber stamp" for Mendenhall. The Court finds that a reasonable jury could not conclude that Kurtze would approve a fifty percent raise when he would not approve an immediate eleven percent raise with an automatic ten percent raise after six months.

Because the evidence introduced at trial is not"direct evidence," Gagnon must proceed to use background circumstances as evidence to show Sprint is the unusual employer who discriminates against the majority. In *Duffy*, the Eighth Circuit adopted the analysis first used by the *Murray* court in which the Sixth Circuit stated:

> [i]n our view, the "reverse discrimination" complainant bears the burden of demonstrating that he was intentionally discriminated against "despite his majority status." [citation omitted]. We agree with the district court that a prima facie case of "reverse discrimination" is established upon a showing that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority;" [citations omitted] and upon a showing that the employer treated differently employees who were similarly situated but not members of the protected group. [citation omitted].

*Murray*, 770 F.2d at 67.

In the present case, Gagnon failed to offer sufficient background circumstances that Sprint is the unusual employer who discriminates against the majority. The evidence showed Sprint hired Gagnon into a training department that was approximately ninety-five percent white and fifty percent male. At the time of his hiring, Gagnon's fellow managers (Meredith-Ball, Rodgers, Snyder, Keenan and Coffman) were

white and three were men. And, within the predominately white male department, Sprint promoted Gagnon six months after he started (by Wilder, a white female, and Mendenhall, a white male) and rewarded him with an eleven percent raise (by Kurtze, also a white male). And, *most significant*, Gagnon did not offer evidence that any similarly situated minorities or female employees were treated differently than him.

Thus, Mendenhall's comment is not direct evidence of reverse discrimination. And, Gagnon did not produce any background evidence, including evidence that similarly situated individuals outside of Gagnon's class were provided preferential treatment, to show that Sprint is the unusual employer who discriminates against the majority. Therefore, Gagnon's reverse discrimination Title VII and MHRA claims fail as a matter of law and, accordingly, the Court entered JAML for Sprint.

## B. JAML- PLAINTIFF'S RETALIATION CLAIM

To establish a prima facie retaliation claim, Gagnon had to prove that: (1) he engaged in a protected activity; (2) Sprint subsequently took an "adverse employment action" against him; and (3) the adverse action was causally linked to his protected activity. *See Scusa v. Nestle U.S.A. .Company, Inc.*, 181 F.3d 958, 968 (8th Cir. 1999) (setting forth elements of a retaliation claim). As a matter of law, Gagnon failed to establish an evidentiary foundation to support the second or third elements of his claim, warranting JAML for Sprint.

"While actions short of termination may constitute an adverse employment action [sic] within the meaning of the

statute, 'not everything that makes an employee unhappy is an actionable adverse action.'" *Manning v. Metro. Life Ins. Co., Inc.*, 127 F,3d 686, 692 (8th Cir. 1997) (quoting *Montanndon v. Farmland Indus. Inc.*, 166 F.3d 355,359 (8th Cir. 1997)). "An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." *Spears v. Mo. Dept. of Corr. & Human Resources*, 210 F.3d 850, 853 (8th Cir, 2000). "Employment actions which do not result in changes in pay, benefits, seniority, or responsibility are insufficient to sustain a retaliation claim." *Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 715 (8th Cir. 2000).

At trial, Gagnon alleged two types of alleged retaliation: (1) his August 1998, written reminder;[19] and (2) alleged ostracism by his co-workers. Viewing the evidence in the light most favorable to Gagnon, he failed to establish that either of these actions rose to the level of actionable retaliation under controlling Eighth Circuit authority.

It is established precedent in the Eighth Circuit that an admonishment to an employee is not actionable retaliation. *See Flannery v. Trans World Airlines, Inc.*, 160 F.3d 425, 427-28 (8th Cir. 1998) (finding reprimands and alteration of an employee's personnel file not adverse employment action). In *Flannery*, the plaintiff alleged retaliatory actions of a change in work hours, reassignment to a different work

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[19] For purposes of this Order, the written reminder includes all terms and conditions contained in the written reminder policy. Specifically, the prohibition on promotions or transfers without approval of a vice-president is treated as part of the written reminder, as a whole.

station, various reprimands and the removal of roughly 300 complimentary letters and commendations from her personnel file. *Id.* at 427. However, similar to Gagnon, the plaintiff in *Flannery* presented no evidence that any of those actions resulted in a reduction in pay, benefits, seniority and the like. *Id.* at 428. Accordingly, the lower court held that the alleged retaliatory actions were not actionable because "there was no showing that they caused any significant disadvantage to Flannery" and the Eighth Circuit affirmed the summary judgment ruling in favor of the employer.[20] *Id.*

In the case at bar, Gagnon did not offer evidence that he suffered a materially adverse employment action and admitted the written reminder caused him no such harm, Specifically, he testified that he did not lose any pay or other benefits of employment as a result of the written reminder. Based on the controlling authority of *Flannery*, Gagnon failed

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[20] Numerous Eighth Circuit opinions echo the holding in *Flannery*. *See, e.g., Spears*, 210 F.3d at 854 (affirming summary judgment; rejecting plaintiff's claims that job transfer and poor job evaluation constituted actionable adverse employment actions); *Scusa*, 181 F.3d at 968-69 (affirming summary judgment; cataloging Eighth Circuit authority holding that actionable adverse action requires a material employment disadvantage or an ultimate employment decision, such as termination); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (affirming summary judgment, and holding that reassignment to more stressful, tedious job that pays the same and has the same benefits is not an actionable employment action, and is "nothing more disruptive than a mere inconvenience or an alteration of job responsibilities").

to establish that the written reminder constituted actionable retaliation as a matter of law.

Similarly, it is well settled in the Eighth Circuit that ostracism and rudeness by co-workers does not rise to the level of an adverse employment action. *See Manning*, 127 F.3d at 693 (hostility and ostracism by supervisor did not rise to the level of an actionable employment action). In *Manning*, the plaintiffs' supervisor constantly talked about his sex life in graphic detail, fondled his genitals and asked female employees for sexual favors. *Id.* at 688. The plaintiffs complained to management about that conduct and in response the supervisor threatened to kill at least one of the plaintiffs and told her that his behavior was not to be questioned. *Id.* at 688-89. The plaintiff claimed the supervisor's threat was actionable retaliation and survived JAML at the trial level and was awarded a $275,000 jury verdict. On appeal, the Eighth Circuit reversed and entered JAML against the plaintiff on her retaliation claim, holding such hostility and ostracism by her supervisor did not rise to the level of an actionable employment action. *Id.* at 693; *see also Scusa*, 181 F.3d at 968-70 (holding that snide remarks and ostracism did not constitute actionable retaliation).

The conduct that Gagnon alleges in the present case is less significant when compared to the evidence in *Manning* and *Scusa*. For example, Gagnon testified, inter alia, that Keenan would not say "hello" to him and would not look at him when they passed in the hallway. Thus, as a matter of law, Gagnon failed to establish that his alleged differences, or ostracism, with his co-workers rose to the level of actionable retaliation by Sprint.

In addition, Gagnon did not introduce evidence that co-worker ostracism was causally linked to his complaints to the EEOC and MHRC. "Title VII protection from retaliation for filing a complaint does not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with peers." *Comstock v. Consumers Markets, Inc.*, 953 F.Supp. 1096, 1104 (W.D. Mo. 1996) (quoting *Valdez v. Mercy Hosp.*, 961 F.2d 1401, 1403 (8th Cir. 1992)). Thus, in order to create a prima facie retaliation claim, Gagnon had to prove the alleged retaliatory actions that he complains about were causally linked to his protected activity. *See Herrero*, 109 F.3d at 484 (holding that plaintiff failed to prove that alleged mistreatment by other employees was causally linked to alleged retaliation).

In regard to Gagnon's claims that his coworkers were cold towards him, he did not offer any evidence that the treatment was linked to his Charge. In fact, Gagnon testified he kept the issue to himself and did not have any reason to believe his coworkers knew about the Charge with the exception of Meredith-Ball, whom he discussed the Charge with and who is also a plaintiff against Sprint in a discrimination lawsuit.

In summary, Gagnon did not offer evidence to link his written reminder and differences with coworkers to his Charge. Instead, Gagnon wanted the Court and the jury to second-guess Wilder's business judgment (for issuing the written reminder) and the reasons why he and some of his fellow employees did not get along. Because "[f]ederal courts do not sit as a super-personnel department that reexamines an entity's business decisions," *Kneibert v. Thomson*

*Newspapers, Michigan Inc.*, 129 F.3d 444, 454 (8th Cir. 1997) (quoting *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 973 (8th Cir. 1994)), Gagnon's claims of retaliation fail as a matter of law and the Court entered JAML in favor of Sprint.

## IV. CONCLUSION

In the case at bar, Gagnon did not introduce sufficient evidence to show as a matter of law that Sprint was the unusual employer who discriminates against the majority in support of his claim of race and gender discrimination. In addition, the introduced evidence was insufficient to support Gagnon's retaliation claim. Based on the foregoing, the Court hereby

**GRANTS** Sprint's motion for **JUDGMENT as A MATTER of LAW** on Gagnon's claim of race and gender discrimination in violation of Title VII and the MHRA. The Court further

**GRANTS** Sprint's motion for **JUDGMENT as A MATTER of LAW** on Gagnon's claim of retaliation as a result of filing a complaint with the EEOC and MHRC and in violation of Title VII and the MHRA. The Court further

**DISMISSES** all remaining claims as moot.

**IT IS SO ORDERED.**

/s/ _____
Dean Whipple
United States District Judge

Date 5/10/01

Supreme Court, U.S.
FILED
SEP 16 2002
OFFICE OF THE CLERK

No. 02-273

**In The**
**Supreme Court of the United States**

SPRINT CORPORATION, d/b/a SPRINT SPECTRUM L.P.,
SPRINT SPECTRUM FINANCE CORPORATION,
d/b/a SPRINT PCS,

*Petitioners,*

v.

WILLIAM E. GAGNON, JR.,

*Respondent.*

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For the Eighth Circuit

# BRIEF IN OPPOSITION TO SPRINT'S PETITION FOR WRIT OF CERTIORARI

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No. 02-273

**In The**
**Supreme Court of the United States**

SPRINT CORPORATION, d/b/a SPRINT SPECTRUM L.P.,
SPRINT SPECTRUM FINANCE CORPORATION,
d/b/a SPRINT PCS,

*Petitioners,*

v.

WILLIAM E. GAGNON, JR.,

*Respondent.*

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For the Eighth Circuit

# BRIEF IN OPPOSITION TO SPRINT'S PETITION FOR WRIT OF CERTIORARI


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**BRIEF IN OPPOSITION TO SPRINT'S PETITION FOR WRIT OF CERTIORARI**

## STATEMENT OF THE CASE

This fact-specific, yet-to-be-tried case arises out of two sets of employment discrimination laws, and evolved from the same contemporaneous set of facts causing discrimination against William E. Gagnon, Jr. ("Gagnon"): (1) reverse discrimination, as a white male; and (2) as a United States, military veteran, having a distinguished career as an officer in the United States Army for twenty-one years. The last decade of Gagnon's military career was spent developing, managing and administering highly sophisticated Computer Based Training ("CBT") and computer simulation training with top security clearance.

Gagnon was discriminated against under Title 42 U.S.C. Section 2000e, ("Title VII"), based on the uncontroverted, contemporaneous admission of Sprint Vice President, Mendenhall, that he would not approve the salary recommendations for Gagnon made by Sprint's human resources department and by management, ". . . because he is just a white guy. . . . if he were a woman or a minority, I would have to pay him, but I don't have to pay him . . . . he's just a white guy." As a direct result, Gagnon, who had received the highest salary ranking for the management team, suffered damages by receiving $10,000 less than any other manager in the Kansas City training department,("TAPS"), as its first CBT-Manager. [1]

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[1] Sprint's factual account in its petition's Statement of the Case, is improperly skewed. Gagnon initially took the non-management Curriculum Developer position in March 1997, at a lower salary, with the understanding that a management position would soon be opening for him – which it did when he became CBT-Manager in October 1997. The evidence contained in Sprint's own documents show the calculation for Gagnon's salary at 100% of the recommended market reference point (MRP) was a 33% or 35% increase, not a 50% increase. Most importantly, Sprint erroneously continues to argue application of a salary guideline (Sprint Petition, p. 4-5) that was **never** used, mentioned or raised by Sprint, until it submitted its response to **Gagnon's** Motion for Summary Judgement in late 2000. Moylan, Director of

Mendenhall ***directed*** Meredith-Ball to revise the salary recommendation to 10%. Meredith-Ball asked him to review the "business case justification" documents, but Mendenhall refused, tossing the paperwork at Meredith-Ball, stating, "I don't care about that stuff. If he wants to walk, let him walk. I'm not going to pay him. He's just a white guy. (Tr. 253-54). (The 11% figure was the result of 10% plus an automatic, pro rata 1% merit increase.)

This overt discrimination was reported to management, including human resources, but no investigation or remedial action occurred. While Sprint had a reporting/investigation policy for sexual harassment, it did not have a reporting policy for other forms of harassment or discrimination.

Contemporaneously, and ongoing, other, uncontroverted facts of discrimination were unfolding against military veterans, including Gagnon, in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994, Title 38 U.S.C. Section 4301 *et seq*., ("USERRA"). The uncontroverted evidence of veterans' discrimination culminated when Sprint formally responded to the Equal Employment Opportunity Commission on Gagnon's, Title VII, EEOC Charge of Discrimination, stating:

> Gagnon's performance was acceptable in that he met or exceeded his supervisor's expectations and the objectives established for his position. While Gagnon is a valued employee, he did not have all of the necessary technical expertise for the management position to which he was promoted until the Company paid for his

---

Compensation, and other Sprint management admitted that the appropriate salary policies were the establishment of Gagnon's MRP, through the Compensation Department, and a salary level within a range of 15% above or below the MRP. To avoid summary judgement in favor of Gagnon, Sprint submitted several affidavits to the trial court, where witnesses attempted to substantively change their deposition testimony, and to create this "after-the-fact" salary policy position invented by Sprint. Gagnon sought to quash the affidavits; however, the trial court not only denied Gagnon's motion, but relied upon the revised affidavit testimony in its decision to deny Gagnon summary judgement. Throughout Gagnon's employment at Sprint, he had the highest MRP and salary grade – but the lowest manager's pay in the department.

> training. Nor did Gagnon have the same level of relevant or industry-related experience. As demonstrated by Gagnon's resume, the majority of his experience before Sprint PCS was in the military; his counterparts had extensive training experience within corporations.

However, in fact, Sprint management admitted there was no inquiry regarding the depth and scope of Gagnon's prior CBT experience and the reporting Director, Wilder, did not even know the scope of Gagnon's experience – which in fact was extensive under any setting. Thus, not only did Sprint's defense lack any credibility, but Sprint attempted to defend against reverse discrimination by directly asserting another unlawful, discriminatory reason -- that Gagnon was paid less, because his, "experience before Sprint PCS was in the military."

Gagnon's claims of USERRA discrimination were never investigated nor remedied. In fact, Gagnon was subsequently punished by Sprint, in writing, specifically for his complaints of discrimination. Gagnon was effectively black-balled from any future transfers or promotions within the Sprint organization. Further, in July and August 1998, Sprint refused to process a salary increase previously promised to Gagnon by his Director, Wilder, in further retaliation.

The District Court granted Sprint's partial motion for summary judgement, dismissing the USERRA claims, effectively holding that negatively assessing a person's military background is not discriminatory. At trial, the District Court granted Sprint's motion for judgement as a matter of law (JAML) dismissing the Title VII claims.

On Gagnon's appeal to the Eighth Circuit Court, the District Court was reversed on the Title VII holding, where Gagnon had met his higher burden in establishing "reverse discrimination," and the uncontroverted evidence established liability against Sprint for race and gender discrimination.

Sprint's Petition for Writ of Certiorari (No. 02-273) challenges that holding of the Eighth Circuit.

Gagnon also appealed the summary judgement granted to Sprint on the USERRA claim. While the Eighth Circuit held that the District Court's interpretation of the USERRA was in error, it *sua sponte* created a statutory interpretation that even though Gagnon was discriminated against as a military veteran, he did not have a monetary remedy.

Gagnon has filed his Petition for Writ of Certiorari on the important public policy, and issue of first impression before this Court, regarding the statutory remedial scheme clearly stated in the USERRA. Gagnon's petition for writ is filed with this Court as Case No. 02-295.

## REASONS FOR DENYING THE WRIT

### I. SPRINT CANNOT SHOW A COMPELLING REASON FOR DISCRETIONARY REVIEW

This Court should deny Sprint's petition for writ of certiorari. Sprint has not presented an issue that meets the standards of this Court for granting a writ under Rule 10. Sprint has simply re-asserted its same arguments properly rejected by the Eighth Circuit in an attempt to avoid a jury trial in this simple case that impacts only one plaintiff and one defendant. This is not a "compelling reason" especially for a case that has not yet been tried to verdict.

In a last minute attempt to create ripe "conflict," Sprint seizes on the August 2, 2002 decision, Costa v. Desert Palace, Inc., 2002 WL 1772643 (9th Cir. 2002), to artificially create non-existent crisis. Gagnon v. Sprint does not pose any conflict among the lower courts. First, Gagnon follows the overwhelming weight of Circuit Courts which correctly and uniformly follow this Court's Price Waterhouse law. (Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

Second, the Costa decision does **not** raise the same issues as Gagnon, and these two cases cannot be adequately juxtaposed to assert such a conflict.

On the Title VII issue, Gagnon presents a simple reverse discrimination case. Under the higher evidentiary standards used by the Eighth Circuit for reverse discrimination, Gagnon has already been subject to, and met, a higher burden of proof. The Costa case did not involve reverse discrimination. Nor does it involve direct evidence. Costa simply has no effect on, or relation to, Gagnon.

Sprint then contends, (as it has at each phase of this case), that a person of the same racial or gender make up as the plaintiff cannot cause discrimination. The Eighth Circuit Court applied the well settled law through the decisions of this Court, which dispel Sprint's theory. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998). Nonetheless, Sprint asserts that the Eighth Circuit decision conflicts with decisions of this Court. It does not.

## II. WRIT OF CERTIORARI IS NOT APPROPRIATE WHERE THE ISSUE HAS NOT BEEN FULLY TRIED.

Sprint filed a motion for partial summary judgment with the District Court in late 2000. The only argument by Sprint was to summarily dismiss Gagnon's claims under the USERRA. Sprint did not challenge the basis of Gagnon's Title VII claims as a matter of law – which was understandable given the uncontroverted evidence of discrimination and retaliation against Gagnon because of his veteran's background.

On January 4, 2001, the District Court granted Sprint's partial motion and dismissed the USERRA claims. The Title VII, reverse discrimination and retaliation claims proceeded to jury trial from January 22, 2001 through January 25, 2001. At the end of Gagnon's case, Sprint moved for judgment as a matter of law, and submitted a brief to the trial court on the spot.

Upon hearing brief oral arguments, within minutes of the motion, the trial judge announced his ruling to dismiss the case, stating:

> This case shows the extreme to which Title VII has come, as people who otherwise shouldn't be asking that they be protected, now decide that they want to get in on that reverse discrimination case. (Tr. 1045).

The trial court then asked Sprint to submit a fully briefed Order of JAML with the opportunity for objection from Gagnon. The Order was eventually entered on May 10, 2001. (App. 4, to Gagnon's Petition, Case No. 02-295). In sum, the trial court held that Vice President, Mendenhall, was not the ultimate decision-maker on Gagnon's salary, because another approval signature was needed after Mendenhall's. The person providing the "fourth" signature, however, was never provided any information regarding the initial paperwork and salary recommendations and only saw the revised proposal after the discrimination had occurred.

The Eighth Circuit rejected the findings of fact and legal conclusions by the trial court, reversing and remanding the case.

The new trial has not occurred and there is no final verdict in the underlying Title VII claim for this Court to review.

Gagnon suggests it would be historically and procedurally unusual for this Court to grant a writ of certiorari on a specific issue that has not reached final judgment at the trial court level. Further, Gagnon contrasts this point to his own petition for writ of certiorari, where his claims under the USERRA have reached final judgment in the trial court and Circuit Court of Appeals, and he would otherwise be denied trial on those issues absent a hearing before this Court.

## III. THE COSTA CASE DOES NOT RAISE THE SAME ISSUES AND DOES NOT CREATE A CONFLICT INVOLVING THE EIGHTH CIRCUIT COURT OF APPEALS.

First, both Costa and Gagnon, as plaintiffs, prevailed in the appellate decisions and thus no conflict results.

Second, in Costa, the Ninth Circuit heard the case, en banc, to review the specific legal argument raised by defendant, Caesars, to wit:

> Caesars argues that Costa should have been held to a special, higher standard of "direct evidence," a threshold it claims she did not meet.

Costa, 2002 WL 1772643, p. 7. This has never been an issue in the Gagnon case.

The thrust of Caesars' argument was that so long as it could posture the case under a mixed-motive analysis, and raise a "same decision" affirmative defense, a plaintiff must always be held to a higher, direct evidence standard, as opposed to Costa's case based on a pretext/circumstantial evidence framework. The Ninth Circuit held that Costa was not required to present a direct evidence case for the jury to hear, even if Caesars' could present a same decision, affirmative defense.

Sprint never has, nor could it, advance such an argument in the Gagnon case. In fact, Gagnon was held to a higher standard of "direct evidence" to move forward with his case. Mendenhall's rejection of both the management and human resources' department recommendations for a higher salary was clearly articulated in his own words, at the time of the decision, ". . . because he's just a white guy."

Sprint's argument always has been that so long as the corporate structure can create another signature of approval, purportedly blind to prior discriminatory action, it can avoid

liability. This argument was properly rejected by the Eighth Circuit and is consistent with every other Circuit Court.

## IV. GAGNON WAS ALREADY HELD TO A HIGHER STANDARD OF EVIDENCE, UNDER EIGHTH CIRCUIT PRECEDENT, IN PRESENTING A "REVERSE" DISCRIMINATION CASE.

Under Eighth Circuit precedent, it was held that in a reverse discrimination case, Gagnon was held to a higher burden of proof:

> Because this is a claim of reverse race discrimination, Gagnon additionally must show "that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir. 1997) (quoting Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985)). However, if Gagnon fails to make this showing, he may still proceed by adducing sufficient evidence of intentional discrimination against ***him***, in order to proceed beyond the prima facie case stage of litigation. Id. In other words, he is clearly able to proceed in a reverse discrimination claim if there is direct evidence of discrimination.

Gagnon v. Sprint, 284 F.3d 839, 848-49.

Again, the different, initial framework applied to Gagnon's reverse discrimination claim separates it far and apart from the fundamental issues arising in the Costa decision. No conflict exists between the courts – unless Sprint is desirous of arguing that the Costa case actually reduces the evidentiary burden already applied to Gagnon. Sprint has obviously attempted to carefully swerve around this critical point in presenting its petition to this Court. Given this higher burden applied to Gagnon, Sprint is aware that it effectively eliminates its "same decision" defense, unless this Court allows Sprint to use unlawful, veterans' discrimination to create a mixed-motive.

## V. IT REMAINS A SETTLED MATTER OF LAW THAT A PERSON WITH THE SAME RACIAL OR GENDER CHARACTERISTICS AS THE PLAINTIFF CAN CAUSE DISCRIMINATION.

Sprint attempts to "bootstrap" into "conflict" an already settled matter of law. At page 21 of Sprint's petition, it contends; "II. Review is Necessary Because the Gagnon Decision Conflicts with the Decision of This Court." The thrust of Sprint's argument is spelled out at pages 21- 22 of the petition, urging that an "animus" of racial and gender discrimination must be shown in Mendenhall's "state of mind." This was the same argument advanced to the trial court – that Mendenhall, as a white male, could not discriminate against a white male. The trial court erroneously accepted this contention in its JAML Order. However, the Eighth Circuit properly rejected this argument both in its written decision and when Sprint raised it in oral arguments. As aptly stated by Judge Morris Shepard Arnold, during oral arguments in Gagnon (34:20):

> Title VII does not require a showing of bigotry, it just simply requires a showing of cause linked to race. So it may be, for instance, that what the gentleman meant was that . . . I would have to give this raise to a black and a woman, but I'm not going to give it to the man because I don't have to, and that has nothing to do with animus in a bigotted sense against males, but it does show a causal relationship between race and the lack of benefits. That's all Title VII requires – motive.

The rejection of Sprint's ongoing animus/bigot argument is absolutely consistent with this Court's rulings:

> [B]ecause of the many facets of human motivation, it would be unwise to presume a matter of law that human beings of one definable group will not discriminate against other members of their group.

Casteneda v. Partida, 430 U.S. 482, 499 (1977); see also Johnson v. Transportation Agency, Santa Clara Cty., 480 U.S. 616, 624-25 (1987); and Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998).

Sprint's, same argument was also effectively rejected in the Costa case – again, emphasizing a lack of any conflict between the Circuit Courts:

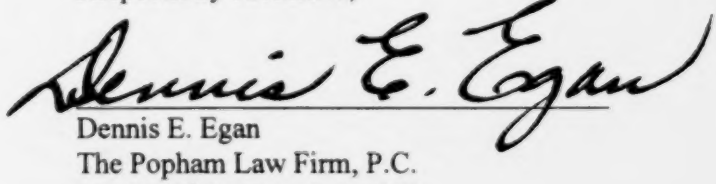
> Finally, we detour briefly to address the suggestion that Hallett was somehow incapable of discriminating against Costa because Hallett was herself a woman. This argument was resoundingly rejected by a unanimous Supreme Court in Oncale, 523 U.S. at 80-81, 118 S.Ct. 998.

Costa, 2002 WL 1772643, at p. 20.

## CONCLUSION

The decision in Gagnon does not conflict with decisions of this Court nor with other Circuit Courts. This fact-driven case involves one plaintiff's unremarkable claim of reverse discrimination that has yet to be tried, and is thus far from ripe. For all of the foregoing reasons, Gagnon, as Respondent in Case No. 02-273, requests this Court to deny Sprint's Petition for a Writ of Certiorari.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Sprint's Petition for Writ of Certiorari were mailed by first-class United State mail, postage prepaid, this 16th day of September, 2002, to:

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